9 86/84-1972

(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

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Syllabus

JUN 10 1986

FEDERAL DEPOSIT INSURANCE CORPORATION *v.* PHILADELPHIA GEAR CORP.

U. S. GOVT. PUBS. DEPOSITORY 378

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 84–1972. Argued March 4, 1986—Decided May 27, 1986

On the application of a customer of respondent, a bank issued a standby letter of credit for respondent's benefit in the amount of $145,200. The letter of credit provided that a draft drawn upon it would be honored by the bank only if accompanied by respondent's signed statement that the customer had failed to make payment for invoiced goods. On the same day that the letter of credit was issued, the customer executed an unsecured promissory note in the bank's favor. The customer and the bank understood the liability on the note to be contingent on respondent's presenting drafts on the letter of credit after the customer's nonpayment. Subsequently, the bank was declared insolvent, and petitioner Federal Deposit Insurance Corporation (FDIC) was appointed its receiver. Respondent then presented to the FDIC drafts on the letter of credit for payment of over $700,000 worth of goods delivered to the customer before the bank became insolvent. When the drafts were returned unpaid, respondent sued the FDIC in Federal District Court, alleging that the letter of credit backed by a promissory note was an insured deposit under the definition of "deposit" in 12 U. S. C. § 1813(*l*)(1) as an unpaid balance of "money or its equivalent" received or held by a bank that, *inter alia*, is evidenced by a letter of credit, and that therefore respondent was entitled to $100,000 in deposit insurance, this being the maximum amount insured by the FDIC. The District Court agreed, and the Court of Appeals affirmed.

Held: A standby letter of credit backed by a contingent promissory note does not give rise to an insured deposit. This has been the FDIC's longstanding interpretation, and such interpretation is consistent with Congress' purpose in creating federal deposit insurance to protect the assets and "hard earnings" that businesses and individuals have entrusted to

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Syllabus

banks. This purpose would not be furthered by extending deposit insurance to cover a standby letter of credit backed by a contingent promissory note, which involves no such surrender of assets or hard earnings to the bank's custody. In this case, the bank was not in possession of any of respondent's or the customer's assets when it went into receivership. Pp. 3–14.

751 F. 2d 1131, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, POWELL, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

No. 84–1972

FEDERAL DEPOSIT INSURANCE CORPORATION, PETITIONER *v.* PHILADELPHIA GEAR CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[May 27, 1986]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari to consider whether a standby letter of credit backed by a contingent promissory note is insured as a "deposit" under the federal deposit insurance program. We hold that, in light of the longstanding interpretation of petitioner Federal Deposit Insurance Corporation (FDIC) that such a letter does not create a deposit and, in light of the fact that such a letter does not entrust any noncontingent assets to the bank, a standby letter of credit backed by a contingent promissory note does not give rise to an insured deposit.

I

Orion Manufacturing Corporation (Orion) was, at the time of the relevant transactions, a customer of respondent Philadelphia Gear Corporation (Philadelphia Gear). On Orion's application, the Penn Square Bank, N. A. (Penn Square) issued a letter of credit for the benefit of Philadelphia Gear in the amount of $145,200. The letter of credit provided that a draft drawn upon the letter of credit would be honored by Penn Square only if accompanied by Philadelphia Gear's "signed statement that [it had] invoiced Orion Manufacturing Corporation and that said invoices have remained unpaid for at least fifteen (15) days." App. 25. Because the letter of credit was intended to provide payment to the seller only if

the buyer of the invoiced goods failed to make payment, the letter of credit was what is commonly referred to as a "standby" or "guaranty" letter of credit. See, *e. g.*, 12 CFR § 337.2(a), and n. 1 (1985) (defining standby letters of credit and mentioning that they may "'guaranty' payment of a money obligation"). A conventional "commercial" letter of credit, in contrast, is one in which the seller obtains payment from the issuing bank without looking to the buyer for payment even in the first instance. See *id.*, n. 1 (distinguishing standby letters of credit from commercial letters of credit). See also Verkuil, Bank Solvency and Guaranty Letters of Credit, 25 Stan. L. Rev. 716, 717–724 (1973); Arnold & Bransilver, The Standby Letter of Credit—The Controversy Continues, 10 U. C. C. L. J. 272, 277–279 (Spring 1978).

On the same day that Penn Square issued the standby letter of credit, Orion executed an unsecured promissory note for $145,200 in favor of Penn Square. App. 27. The purpose of the note was listed as "Back up Letter of Credit." *Ibid.* Although the face of the note did not so indicate, both Orion and Penn Square understood that nothing would be considered due on the note, and no interest charged by Penn Square, unless Philadelphia Gear presented drafts on the standby letter of credit after nonpayment by Orion. 751 F. 2d 1131, 1134 (CA10 1984). See also Tr. of Oral Arg. 32.

On July 5, 1982, Penn Square was declared insolvent. Petitioner Federal Deposit Insurance Corporation (FDIC) was appointed its receiver. Shortly thereafter, Philadelphia Gear presented drafts on the standby letter of credit for payment of over $700,000 for goods delivered before Penn Square's insolvency. The FDIC returned the drafts unpaid. 751 F. 2d., at 1133–1134.

Philadelphia Gear sued the FDIC in the Western District of Oklahoma. Philadelphia Gear alleged that the standby letter of credit was an insured deposit under the definition of "deposit" set forth at 12 U. S. C. § 1813(*l*)(1), and that Philadelphia Gear was therefore entitled to $100,000 in deposit in-

surance from the FDIC. See 12 U. S. C. § 1821(a)(1) (setting forth $100,000 as the maximum amount generally insured by the FDIC for any single depositor at a given bank). In apparent hopes of obtaining additional funds from the FDIC in the latter's capacity as receiver rather than as insurer, respondent also alleged that terms of the standby letter of credit allowing repeated reinstatements of the credit made the letter's total value more than $145,200.

The District Court held that the total value of the standby letter of credit was $145,200, App. B to Pet. for Cert. 20a, 28a-30a; that the letter was an insured deposit on which the FDIC was liable for $100,000 in deposit insurance, *id.*, at 37a-43a; and that Philadelphia Gear was entitled to prejudgment interest on that $100,000, *id.*, at 43a. The FDIC appealed from the District Court's ruling that the standby letter of credit backed by a contingent promissory note constituted a "deposit" for purposes of 12 U. S. C. § 1813(*l*)(1) and its ruling that Philadelphia Gear was entitled to an award of prejudgment interest. Philadelphia Gear cross-appealed from the District Court's ruling on the total value of the letter of credit.

The Court of Appeals for the Tenth Circuit reversed the District Court's award of prejudgment interest, 751 F. 2d, at 1138–1139, but otherwise affirmed the District Court's decision. As to the definition of "deposit," the Court of Appeals held that a standby letter of credit backed by a promissory note fell within the terms of 12 U. S. C. § 1813(*l*)(1)'s definition of "deposit," and was therefore insured. *Id.*, at 1134–1138. We granted the FDIC's petition for certiorari on this aspect of the Court of Appeals' ruling. 474 U. S. —— (1985). We now reverse.

II

Title 12 U. S. C. § 1813(*l*)(1) provides:

> "The term 'deposit' means—
>
> "(1) the unpaid balance of money or its equivalent received or held by a bank in the usual course of business

> and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial . . . account, or which is evidenced by . . . a letter of credit or a traveler's check on which the bank is primarily liable: *Provided*, That, without limiting the generality of the term 'money or its equivalent,' any such account or instrument must be regarded as evidencing the receipt of the equivalent of money when credited or issued in exchange for checks or drafts or for a promissory note upon which the person obtaining any such credit or instrument is primarily or secondarily liable . . . ."

Philadelphia Gear successfully argued before the Court of Appeals that the standby letter of credit backed by a contingent promissory note constituted a "deposit" under 12 U. S. C. § 1813(*l*)(1) because that letter was one on which the bank was primarily liable, and evidenced the receipt by the bank of "money or its equivalent" in the form of a promissory note upon which the person obtaining the credit was primarily or secondarily liable. The FDIC does not here dispute that the bank was primarily liable on the letter of credit. Brief for Petitioner 7, n. 7. Nor does the FDIC contest the fact that the backup note executed by Orion is, at least in some sense, a "promissory note." See Tr. of Oral Arg. 7 (remarks of Mr. Rothfeld, representing the FDIC) ("It was labeled a note. It can be termed a note"). The FDIC argues rather that it has consistently interpreted § 1813(*l*)(1) not to include standby letters of credit backed only by a contingent promissory note because such a note represents no hard assets and thus does not constitute "money or its equivalent." Because the alleged "deposit" consists only of a *contingent* liability, asserts the FDIC, a standby letter of credit backed by a contingent promissory note does not give rise to a "deposit" that Congress intended the FDIC to insure. Under this theory, while the note here may have been labeled a promissory note on its face and may have been a promissory note under state law, it was not a promissory note for pur-

poses of the federal law set forth in 12 U. S. C. § 1813(*l*)(1). See *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 456 (1942) (holding that liability on a promissory note acquired by the FDIC is a federal question); *First National Bank* v. *Dickinson*, 396 U. S. 122, 133–134 (1969) (holding that federal law governs the definition of branch banking under the McFadden Act).

The Court of Appeals quite properly looked first to the language of the statute. See *Florida Power & Light Co.* v. *Lorion*, 470 U. S. ——, —— (1985); *United States* v. *Yermian*, 468 U. S. 63, 68 (1984). Finding the language of the proviso in § 1813(*l*)(1) sufficiently plain, the Court of Appeals looked no further. But as the FDIC points out, the terms "letter of credit" and "promissory note" as used in the statute have a federal definition, and the FDIC has developed and interpreted those definitions for many years within the framework of the complex statutory scheme that the FDIC administers. The FDIC's interpretation of whether a standby letter of credit backed by a contingent promissory note constitutes a "deposit" is consistent with Congress' desire to protect the hard earnings of individuals by providing for federal deposit insurance. Since the creation of the FDIC, Congress has expressed no dissatisfaction with the FDIC's interpretaton of "deposit"; indeed, Congress in 1960 adopted the FDIC's regulatory definition as the statutory language. When we weigh all these factors together, we are constrained to conclude that the term "deposit" does not include a standby letter of credit backed by a contingent promissory note.

A

Justice Holmes stated that, as to discerning the constitutionality of a federal estate tax, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). Although the genesis of the Federal Deposit Insurance Act may not be quite so powerful a substitute for legal analysis, that history is worthy of at least a page of

recounting for the light it sheds on Congress' purpose in passing the Act. Cf. *Watt* v. *Alaska*, 451 U. S. 259, 266 (1981) ("The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect").

When Congress created the FDIC, the Nation was in the throes of an extraordinary financial crisis. See generally F. Allen, Since Yesterday: The Nineteen-Thirties in America 98–121 (1940); A. Schlesinger, The Crisis of the Old Order 474–482 (1957). More than one-third of the banks in the United States open in 1929 had shut their doors just four years later. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, pt. 2, pp. 1019, 1038 (1976). In response to this financial crisis, President Roosevelt declared a national banking holiday effective the first business day after he took office. 48 Stat. 1689. Congress in turn responded with extensive legislation on banking, including the laws that gave the FDIC its existence.

Congress' purpose in creating the FDIC was clear. Faced with virtual panic, Congress attempted to safeguard the hard earnings of individuals against the possibility that bank failures would deprive them of their savings. Congress passed the 1933 provisions "[i]n order to provide against a repetition of the present painful experience in which a vast sum of *assets and purchasing power* is 'tied up.'" S. Rep. No. 77, 73rd Cong., 1st Sess., 12 (1933) (emphasis added). The focus of Congress was therefore upon ensuring that a deposit of "hard earnings" entrusted by individuals to a bank would not lead to a tangible loss in the event of a bank failure. As the chairman of the relevant Committee in the House of Representatives explained on the floor:

> "[T]he purpose of this legislation is to protect the people of the United States in the right to have banks in which their deposits will be safe. They have a right to expect of Congress the establishment and maintenance of a system of banks in the United States where citizens may

> place their hard earnings with reasonable expectation of being able to get them out again upon demand. . . .
>
> . . . . . .
>
> "[The purpose of the bill is to ensure that] the community is saved from the shock of a bank failure, and every citizen has been given an opportunity to withdraw his deposits. . . .
>
> . . . . . .
>
> "The public . . . demand of you and me that we provide a banking system worthy of this great Nation and banks in which citizens may place the fruits of their toil and know that a deposit slip in return for their hard earnings will be as safe as a Government bond."
>
> 77 Cong. Rec. 3837, 3838, 3840 (1933) (remarks of Rep. Steagall).

See also *id.*, at 3913 (remarks of Rep. Keller) ("[We must make] it absolutely certain that . . . any and every man, woman, or child who puts a dollar in any bank can absolutely know that he will under no circumstances lose a single penny of it"); *id.*, at 3924 (remarks of Rep. Green) ("It is time that we pass a law so secure that when a man puts his money in a bank he will know for sure that when he comes back it will be there"). To prevent bank failure that resulted in the tangible loss of hard assets was therefore the focus of Congress' effort in creating deposit insurance.

Despite the fact Congress revisited the deposit insurance statute in 1935, 1950, and 1960, these comments remain the best indication of Congress' underlying purpose in creating deposit insurance. The reports on the 1935 amendments presented the definition of "deposit" without any specific comment. See H. R. Rep. No. 742, 74th Cong., 1st Sess., 2 (1935); S. Rep. No. 1007, 74th Cong., 1st Sess., 2–4 (1935); H. R. Conf. Rep. No. 1822, 74th Cong., 1st Sess., 44 (1935). The floor debates centered around changes in the Federal Reserve System made in the same bill, not on deposit insurance. See, *e. g.*, 79 Cong. Rec. 6568–6577, 6651–6660 (1935).

Indeed, in light of the fact that instruments denominated "promissory notes" seem at the time to have been considered exclusively uncontingent, see, *e. g.*, Fed. Res. Bull. 520 (1930) (Regulation A) (defining promissory note as an "*unconditional* promise . . . to pay [a sum certain in dollars] at a fixed or determinable future time") (emphasis added); *Gilman* v. *Commissioner*, 53 F. 2d 47, 50 (CA8 1931) ("The form of these [contingent] instruments referred to as 'promissory notes' is very unusual"), it is unlikely that Congress would have had occasion to refer expressly to contingent notes such as the one before us here even if Congress had turned its attention to the definition of "deposit" when it first enacted the provision treating "money or its equivalent."

The legislative history of the 1950 amendments is similarly unhelpful, as one would expect given that the relevant provisions were re-enacted but unchanged. See S. Rep. No. 1269, 81st Cong., 2d Sess., 2–3 (1950); H. R. Rep. No. 2564, 81st Cong., 2d Sess., 5–6 (1950). The Committee Reports on the 1960 amendments likewise give no indication that the amendments' phrasing was meant to effect any fundamental changes in the definition of deposit; those Reports state only that the changes are intended to bring into harmony the definitions of "deposit" used for purposes of deposit insurance with those used in reports of condition, and that the FDIC's rules and regulations are to be incorporated into the new definition. See H. R. Rep. No. 1827, 86th Cong., 2d Sess., 3, 5 (1960); S. Rep. No. 1821, 86th Cong., 2d Sess., 7, 10 (1960). See also 106 Cong. Rec. 14,794 (1960) (discussing pre-1960 scheme).

Congress' focus in providing for a system of deposit insurance—a system that has been continued to the present without modification to the basic definition of deposits that are "money or its equivalent"—was clearly a focus upon safeguarding the assets and "hard earnings" that businesses and individuals have entrusted to banks. Congress wanted to ensure that someone who put tangible assets into a bank

could always get those assets back. The purpose behind the insurance of deposits in general, and especially in the section defining deposits as "money or its equivalent," therefore, is the protection of assets and hard earnings entrusted to a bank.

This purpose is not furthered by extending deposit insurance to cover a standby letter of credit backed by a contingent promissory note, which involves no such surrender of assets or hard earnings to the custody of the bank. Philadelphia Gear, which now seeks to collect deposit insurance, surrendered absolutely nothing to the bank. The letter of credit is for Philadelphia Gear's benefit, but the bank relied upon Orion to meet the obligations of the letter of credit and made no demands upon Philadelphia Gear. Nor, more importantly, did Orion surrender any assets unconditionally to the bank. The bank did not credit any account of Orion's in exchange for the promissory note, and did not treat its own assets as increased by its acceptance of the note. The bank could not have collected on the note from Orion unless Philadelphia Gear presented the unpaid invoices and a draft on the letter of credit. In the absence of a presentation by Philadelphia Gear of the unpaid invoices, the promissory note was a wholly contingent promise, and when Penn Square went into receivership, neither Orion nor Philadelphia Gear had lost anything except the ability to use Penn Square to reduce Philadelphia Gear's risk that Philadelphia Gear would go unpaid for a delivery of goods to Orion.

B

Congress' actions with respect to the particular definition of "deposit" that it has chosen in order to effect its general purpose likewise lead us to believe that a standby letter of credit backed by a contingent promissory note is not an insurable "deposit." In 1933, Congress amended the Federal Reserve Act to authorize the creation of the FDIC and charged it "to insure . . . the deposits of all banks which are entitled

to the benefits of [FDIC] insurance." §8, Banking Act of 1933, ch. 89, 48 Stat. 168. Congress did not define the term "deposit," however, until the Banking Act of 1935, in which it stated:

> "The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account, or which is evidenced by its certificate of deposit, and trust funds held by such bank whether retained or deposited in any department of such bank or deposited in another bank, together with such other obligations of a bank as the board of directors [of the FDIC] shall find and shall prescribe by its regulations to be deposit liabilities by general usage . . . ." §101, Banking Act of 1935, ch. 614, 49 Stat. 684, 685–686.

Less than two months after this statute was enacted, the FDIC promulgated a definition of "deposit," which provided in part that "letters of credit must be regarded as issued for the equivalent of money when issued in exchange for . . . promissory notes upon which the person procuring [such] instruments is primarily or secondarily liable." See 12 CFR §301.1(d) (1939) (codifying Regulation I, rule 1, Oct. 1, 1935), *revoked after incorporation into statutory law*, 12 CFR 234 (Supp. 1962).

In 1950, Congress revisited the provisions specifically governing the FDIC in order to remove them from the Federal Reserve Act and place them into a separate Act. See Act of Sept. 21, 1950, ch. 967, 64 Stat. 874. The new provisions did not modify the definition of "deposit." In 1960, Congress expanded the statutory definition of "deposit" in several categories, and also incorporated the regulatory definition that the FDIC had employed since 1935 into the statute that remains in force today. See *supra*, at 3–4 (quoting current version of statute).

At no point did Congress disown its initial, clear desire to protect the hard assets of depositors. See *supra*, at 6–9. At no point did Congress criticize the FDIC's longstanding interpretation, see *infra*, at 12–13, that a standby letter of credit backed by a contingent promissory note is not a "deposit." In fact, Congress had re-enacted the 1935 provisions in 1950 without changing the definition of "deposit" at all. Compare 49 Stat. 685–686 with 64 Stat. 874–875. When the statute giving rise to the longstanding interpretation has been re-enacted without pertinent change, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell Aerospace*, 416 U. S. 267, 275 (1974). See *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 457 (1978). Indeed, the current statutory definition of "deposit," added by Congress in 1960, was expressly designed to incorporate the FDIC's rules and regulations on "deposits." As Committees of both Houses of Congress explained the amendments: "The amended definition would include the present statutory definition of deposits, *and the definition of deposits in the rules and regulations of the Federal Deposit Insurance Corporation*, [along] with . . . changes [in sections other than what is now § 1813(*l*)(1)]." H. R. Rep. No. 1827, 86th Cong., 2d Sess., 5 (1960) (emphasis added); S. Rep. No. 1821, 86th Cong., 2d Sess., 10 (1960) (same). Congress, therefore, has expressly incorporated into the statutory scheme the regulations that the FDIC devised to assist it in determining what constitutes a "deposit" within the statutory scheme. Under these circumstances, we must obviously give a great deal of deference to the FDIC's interpretation of what these regulations do and do not include within their definition of "deposit."

C

Although the FDIC does not argue that it has an express regulation excluding a standby letter of credit backed by a

contingent promissory note from the definition of "deposit" in 12 U. S. C. § 1813(*l*)(1), that exclusion by the FDIC is nonetheless longstanding and consistent. At a meeting of FDIC and bank officials shortly after the FDIC's creation, a bank official asked whether a letter of credit issued by a charge against a customer's account was a deposit. The FDIC official replied:

> "'If your letter of credit is issued by a charge against a depositor's account or for cash and the letter of credit is reflected on your books as a liability, you do have a deposit liability. If, on the other hand, you merely extend a line of credit to your customer, you will only show a contingent liability on your books. In that event no deposit liability has been created.'" Transcript as quoted in *FDIC* v. *Irving Trust Co.*, 137 F. Supp. 145, 161 (SDNY 1955).

Because Penn Square apparently never reflected the letter of credit here as a noncontingent liability, and because the interwoven financial instruments at issue here can be viewed most accurately as the extension of a line of credit by Penn Square to Orion, this transcript lends support to the FDIC's contention that its longstanding policy has been to exclude standby letters of credit backed by contingent promissory notes from 12 U. S. C. § 1813(*l*)(1)'s definition of "deposit."

The FDIC's contemporaneous understanding that standby letters of credit backed by contingent promissory notes do not generate a "deposit" for purposes of 12 U. S. C. § 1813(*l*)(1) has been fortified by its behavior over the following decades. The FDIC has asserted repeatedly that it has never charged deposit insurance premiums on standby letters of credit backed by contingent promissory notes, and Philadelphia Gear does not contest that assertion. See Tr. of Oral Arg. 42. Congress requires the FDIC to assess contributions to its insurance fund at a fixed percentage of a bank's "deposits" under 12 U. S. C. § 1813(*l*)(1). See 12 U. S. C. §§ 1817(a)(4), (b)(1), (b)(4)(A). By the time that

this suit—the first challenge to the FDIC's treatment of standby letters of credit backed by contingent promissory notes—was brought, almost $100 billion in standby letters of credit was outstanding. See Board of Governors of the Federal Reserve System, Annual Statistical Digest 71 (1983); FDIC, 1983 Statistics on Banking (Table 110F). The FDIC's failure to levy premiums on standby letters of credit backed by contingent promissory notes therefore clearly demonstrates that the FDIC has never considered such letters to reflect deposits.

Although the FDIC's interpretation of the relevant statute has not been reduced to a specific regulation, we conclude nevertheless that the FDIC's practice and belief that a standby letter of credit backed by a contingent promissory note does not create a "deposit" within the meaning of 12 U. S. C. § 1813(*l*)(1) is entitled in the circumstances of this case to the "considerable weight [that] should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984). As we have stated above, the FDIC's interpretation here of a statutory definition adopted wholesale from the FDIC's own regulation is consistent with congressional purpose, and may certainly stand.

III

Philadelphia Gear essentially seeks to have the FDIC guarantee the contingent credit extended to Orion, not assets entrusted to the bank by Philadelphia Gear or by Orion on Philadelphia Gear's behalf. With a standard "commercial" letter of credit, Orion would typically have unconditionally entrusted Penn Square with funds before Penn Square would have written the letter of credit, and thus Orion would have lost something if Penn Square became unable to honor its obligations. As the FDIC concedes, deposit insurance extends to such a letter of credit backed by an uncontingent promis-

sory note. See Tr. of Oral Arg. 8 (statement of Mr. Rothfeld, representing the FDIC) ("If this note were a fully uncontingent negotiable note that were not limited by any side agreements, it would be a note backing a letter of credit within the meaning of the statute"). See also *id.*, at 17–18. But here, with a standby letter of credit backed by a contingent promissory note, Penn Square was not in possession of any of Orion's or Philadelphia Gear's assets when it went into receivership. Nothing was ventured, and therefore no insurable deposit was lost. We believe that, whatever the relevant State's definition of "letter of credit" or "promissory note," Congress did not by using those phrases in 12 U. S. C. § 1813(*l*)(1) intend to protect with deposit insurance a standby letter of credit backed only by a contingent promissory note. We thus hold that such an arrangement does not give rise to a "deposit" under 12 U. S. C. § 1813(*l*)(1).

Accordingly, the judgment of the court below is reversed, and the case remanded for further proceedings consistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 84–1972

FEDERAL DEPOSIT INSURANCE CORPORATION, PETITIONER *v.* PHILADELPHIA GEAR CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[May 27, 1986]

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

There is considerable common sense backing the Court's opinion. The standby letter of credit in this case differs considerably from the savings and checking accounts that come most readily to mind when one speaks of an insured deposit. Nevertheless, to reach this common-sense result, the Court must read qualifications into the statute that do not appear there. We recently recognized that even when the ingenuity of businessmen creates transactions and corporate forms that were perhaps not contemplated by Congress, the courts must enforce the statutes that Congress has enacted. See *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S. ——, —— (1986) (slip op. 11–13). Congress unmistakably provided that letters of credit backed by promissory notes constitute "deposits" for purposes of the federal deposit insurance program, and the Court's attempt to draw distinctions between different types of letter of credit transactions forces it to ignore both the statute and some settled principles of commercial law. Here, as in *Dimension*, the inflexibility of the statute as applied to modern financial transactions is a matter for Congress, not the FDIC or this Court, to remedy.

It cannot be doubted that the standby letter of credit in this case meets the literal definition of a "deposit" contained in 12 U. S. C. § 1813(*l*)(1). It is "a letter of credit . . . on which the bank is primarily liable . . . issued in exchange for . . . a promissory note upon which [Orion] is primarily or secondarily liable." The Court, however, holds that the note in this case, whether or not it is a promissory note under the Uniform Commercial Code (UCC) and Oklahoma law, is not a promissory note for purposes of the Federal Deposit Insurance Act. We should assume, absent convincing evidence to the contrary, that Congress intended for the term "promissory note" to derive its meaning from the ordinary sources of commercial law. I believe that there is no such evidence in this case.

The Court justifies its restrictive reading of the term "promissory note" in large part by arguing that Congress would not have wanted to include in that term any obligation that was not the present equivalent of money. The keystone of the FDIC's arguments, and of the Court's decision, is that Orion did not entrust "money or its equivalent" to the bank. The note in this case, however, was the equivalent of money, and the Court's reading of Congress' intent is therefore largely irrelevant.

FDIC concedes, as it must, that Congress has determined that a promissory note generally constitutes money or its equivalent. Moreover, that statutory definition comports with economic reality. Promissory notes typically are negotiable instruments and therefore readily convertible into cash. The FDIC argues, and the Court holds, that the promissory note in this case is "contingent" and therefore not the equivalent of money. However, while the FDIC argues strenuously that Orion's note is not a promissory note in the usual sense of the word, one could more plausibly state that it is not a "contingent" obligation in the usual sense of that word. On its face the note is an unconditional obligation of

Orion to pay the holder $145,200 plus accrued interest on August 1, 1982. It sets out no conditions that would affect the negotiability of the note, and therefore is fully negotiable for purposes of the UCC, U.C.C. §3–104(1) (1977); Okla. Stat., Tit. 12A, §3–104(1) (1981).

The Court therefore misses the point when it states that at the time of the original banking Acts, the term "promissory note" was not understood to include a contingent obligation. *Ante*, at 8. The note at issue in this case is an unconditional promise to pay, and satisfies all the requisites of a negotiable promissory note, either under the UCC or the common law as it existed in the 1930's. The only contingencies attached to Orion's obligation arise out of a separate contract. As to such contingencies, the law was well settled long before 1930:

> "[I]n order to make a note invalid as a promissory note, the contingency to avoid it must be apparent, either upon the face of the note, or upon some contemporaneous written memorandum on the same paper; for, if the memorandum is not contemporaneous, or if it be merely verbal in each case, whatever may be its effect as a matter of defence between the original parties, it is not deemed to be a part of the instrument, and does not affect, much less invalidate, its original character." J. Thorndike, Story on Promissory Notes 34 (7th ed. 1878) (footnotes omitted).[1]

It is far from a matter of semantics to state that while Orion and the bank may have an oral understanding concerning the bank's treatment of Orion's note, that note itself is unconditional, and equivalent to money. The Court correctly

[1] We would have a very different case if the conditions put upon Orion's obligation to the bank were reflected on the face of the note, as they were in *Allen* v. *FDIC*, 599 F. Supp. 104 (ED Tenn. 1984), appeal pending, No. 85–5003 (CA6), a case raising the same issue as the present one. Because such a note is not negotiable, it is much more plausible to argue that Congress would not have considered it "money or its equivalent." The note in this case, however, is in no sense a contingent note.

observes that the bank would have breached its oral contract had it attempted to sue on the note; nevertheless, Orion would have had separately to plead and prove a breach of contract in that case, because parol evidence that the contract between the parties differed from the written instrument would have been inadmissible in the bank's action to collect the debt. See *American Perforating Co.* v. *Oklahoma State Bank*, 463 P. 2d 958, 962–963 (Okla. 1970). Similarly, should the note have found its way into the hands of a third party, Orion would have had no choice but to honor it, again being left with only the right to sue the bank for breach of the oral contract. Orion's entrustment of the note to the bank was not, therefore, completely risk free.

The risk taken on by Orion may not differ substantially from the risk assumed by one who hands over money to the bank to guaranty repayment of funds paid out on a letter of credit. The bank typically undertakes to put such cash collateral into a special account, where it never enters into the general assets of the bank. See U.C.C. §5–117, comment (1977). Should the bank cease operations, the customer will enjoy a preference in bankruptcy, entitling it to receive its money back before general unsecured creditors of the bank are paid. U.C.C. §5–117; Okla. Stat., Tit. 12A, §5–117 (1981). Like Orion, then, that hypothetical customer has little to fear absent misconduct by the bank or a third party. If the federal deposit insurance program should not protect Philadelphia Gear, therefore, it probably should not protect *any* holder of a letter of credit, whether commercial, standby, funded, or unfunded.[2] That, however, is clearly a matter for Congress to determine.

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[2] It seems odd that Philadelphia Gear's status as an insured depositor should depend on the terms of the repayment agreement between Orion and the bank. Ordinarily, Philadelphia Gear would be indifferent to the agreement between Orion and the bank, and might not even be aware of the terms of that agreement. The Court, therefore, is not necessarily bringing greater rationality to this area of the law by creating distinctions

While the Court purports to examine what Congress meant when it said "promissory note," in fact the Court's opinion does not rest on any special attributes of Orion's note. Rather, the Court rules that when an individual entrusts a negotiable instrument to a bank, that instrument is not "money or its equivalent" for purposes of § 1813(*l*)(1) so long as the bank promises not to negotiate it or collect on it until certain conditions are met. That is a proviso that Congress might have been well-advised to include in the Act, but did not. I therefore dissent.

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between types of letters of credit for purposes of federal deposit insurance coverage.

986/84-1973

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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Syllabus

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION *v.* WOLD ENGINEERING, P. C., ET AL.

DEPOSITORY 376

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

No. 84–1973. Argued March 24, 1986—Decided June 16, 1986

Petitioner Indian tribe brought suit against respondent corporation (hereafter respondent) in a North Dakota state court for negligence and breach of contract in connection with respondent's construction of a water-supply system on petitioner's reservation. The trial court dismissed the suit for lack of jurisdiction. The North Dakota Supreme Court held that a North Dakota statute (Chapter 27–19)—which provides that jurisdiction of the State shall be extended over all civil claims for relief that arise on an Indian reservation upon acceptance by Indian citizens—disclaimed the unconditional state court civil jurisdiction North Dakota had previously extended to tribal Indians suing non-Indians in state court, and that Chapter 27–19 barred petitioner from maintaining its suit in state court absent its waiver of sovereign immunity.

Held:

1. Because the federal statute governing state assumption of jurisdiction over Indian country, Pub. L. 280, was designed to extend the jurisdiction of the States over Indian country and to encourage state assumption of such jurisdiction, and because Congress specifically considered the issue of retrocession but did not provide for disclaimers of jurisdiction lawfully acquired other than under Pub. L. 280 prior to 1968, such disclaimers cannot be reconciled with the congressional plan embodied in Pub. L. 280 and thus are pre-empted. Pp. 7–10.

2. The conclusion that the operation of the North Dakota jurisdictional scheme in this case is inconsistent with federal law is reinforced by the fact that it imposes an undue burden on federal and tribal interests in

JUL 6. 8/b:

Syllabus

Indian self-government and autonomy, as well as the federal interest in ensuring access to the courts. Pp. 10–16.

364 N. W. 2d 98, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84–1973

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, PETITIONER *v.* WOLD ENGINEERING ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

[June 16, 1986]

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioner, Three Affiliated Tribes of the Fort Berthold Reservation, sought to sue respondent, Wold Engineering, P. C., in state court for negligence and breach of contract. The North Dakota Supreme Court held that Chapter 27–19 of the North Dakota Century Code (1974) disclaimed the unconditional state court civil jurisdiction North Dakota had previously extended to tribal Indians suing non-Indians in state court. It ruled that under Chapter 27–19, petitioner could not avail itself of state court jurisdiction unless it consented to waive its sovereign immunity and to have any civil disputes in state court to which it is a party adjudicated under state law. 364 N. W. 2d 98 (1985). The question presented is whether Chapter 27–19, as construed by the North Dakota Supreme Court, is repugnant to the Federal Constitution or is pre-empted by federal Indian law.

I

This is the second time this Court has been called upon to address this jurisdictional controversy. See *Three Affiliated Tribes* v. *Wold Engineering (Three Tribes I)*, 467 U. S. 138 (1984). Because the facts and procedural history of the litigation were set forth in some detail in *Three Tribes I*, our present recitation will be brief.

Historically, Indian territories were generally deemed beyond the legislative and judicial jurisdiction of the state governments. See *id.*, at 142. This restriction was reflected in the federal statute which admitted North Dakota to the union, Enabling Act of Feb. 22, 1889, § 4, cl. 2, 25 Stat. 677, and was embodied in the form of jurisdictional disclaimers in North Dakota's original Constitution. See N. D. Const., Art. XVI, § 203, cl. 2 (1889). The pre-existing federal restrictions on state jurisdiction over Indian country were largely eliminated, however, in 1953 with Congress' enactment of the Act of Aug. 15, 1953, 67 Stat. 588, as amended, 28 U. S. C. § 1360, which is commonly known as Pub. L. 280. Pub. L. 280 gave federal consent to the assumption of state civil and criminal jurisdiction over Indian country and provided the procedures by which such an assumption could be made. See *Three Tribes I*, *supra*, at 143. As originally enacted, Pub. L. 280 did not require the States to obtain the consent of affected Indian tribes before assuming jurisdiction over them, but Title IV of the Civil Rights Act of 1963 amended Pub. L. 280 to require that all subsequent assertions of jurisdiction be preceded by tribal consent. Pub. L. 90–284, §§ 401, 402, 406, 82 Stat. 78–80, codified at 25 U. S. C. §§ 1321, 1322, 1326.

As this Court explained in *Three Tribes I*,

> "[e]ven before North Dakota moved to amend its Constitution and assume full jurisdiction under Pub. L. 280, the North Dakota Supreme Court had taken an *expansive* view of the scope of state-court jurisdiction over Indians in Indian country. In 1957, the court held [in *Vermillion* v. *Spotted Elk*, 85 N. W. 2d 432 (1957)] that the existing jurisdictional disclaimers in the Enabling Act and the State's Constitution foreclosed civil jurisdiction over Indian country only in cases involving interests in Indian lands themselves." 467 U. S., at 143–144.

Although *Vermillion* v. *Spotted Elk*, 85 N. W. 2d 432 (1957), was decided after the enactment of Pub. L. 280, the North

Dakota Supreme Court made clear that it was confirming pre-existing jurisdiction rather than establishing a previously unavailable jurisdictional category. *Id.*, at 435–436. See also *Three Tribes I*, 467 U. S., at 150, n. 9.

That part of *Vermillion* that recognized jurisdiction over non-Indians' claims against Indians impermissibly intruded on tribal self-government and thus could not be sustained. *Id.*, at 148. See also *Fisher* v. *District Court*, 424 U. S. 382 (1976); *Williams* v. *Lee*, 358 U. S. 217 (1959). But, as this Court in *Three Tribes I* affirmed, North Dakota's recognition of jurisdiction over the claims of Indian plaintiffs against non-Indian defendants was lawful because such jurisdiction did not interfere with the right of tribal Indians to govern themselves and was not subject to Pub. L. 280's procedural requirements since the jurisdiction was lawfully assumed prior to that enactment. See 467 U. S., at 148–149, 151, n. 11.

In 1958, North Dakota amended its Constitution to authorize its legislature to provide by statute for the acceptance of jurisdiction over Indian country, see N. D. Const., Art. XIII, § 1, cl. 2, and in 1963, the North Dakota legislature enacted Chapter 27–19. That Chapter provides, in pertinent part:

> "In accordance with the provisions of Public Law 280 . . . and [the amended] North Dakota constitution, jurisdiction of the state of North Dakota shall be extended over all civil claims for relief which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter. Upon acceptance the jurisdiction of the state is to the same extent that the state has jurisdiction over other civil claims for relief, and those civil laws of this state that are of general application to private property have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state." N. D. Cent. Code § 27–19–01 (Supp. 1985).

In subsequent cases, the North Dakota Supreme Court read this provision to "completely disclaim" the state jurisdiction recognized in *Vermillion* in cases in which the defendant was an Indian, absent tribal consent to jurisdiction as provided by statute. See, *e. g., In re Whiteshield,* 124 N. W. 2d 694 (1963). However, until the instant suit, the court never squarely held that Chapter 27–19 also disclaimed the jurisdiction *Vermillion* lawfully recognized over cases in which an Indian sued a non-Indian in state court for a claim arising in Indian country. See *Three Tribes I, supra,* at 144–145.

Petitioner filed the instant suit against respondent in state court for negligence and breach of contract in connection with respondent's construction of a water-supply system on petitioner's reservation. At the time the suit was filed, petitioner's tribal court did not have jurisdiction over such claims. After counterclaiming for petitioner's alleged failure to make payments on the system, respondent moved to dismiss petitioner's complaint, arguing that the state court had no jurisdiction because petitioner has never consented to state-court jurisdiction over the Fort Berthold Reservation under Chapter 27–19. The trial court dismissed the suit for lack of jurisdiction, and the North Dakota Supreme Court affirmed the dismissal on appeal. 321 N. W. 2d 510 (1982).

In so doing, the North Dakota Supreme Court held that any residuary jurisdiction the North Dakota courts possessed under *Vermillion* over suits by an Indian against a non-Indian arising in Indian country was "totally disclaimed" when the North Dakota legislature, "[u]nder the authority of Public Law 280," instituted the consent requirement of Chapter 27–19. 321 N. W. 2d, at 511–512. It concluded that "we have no jurisdiction over civil causes of action arising within the exterior boundaries of an Indian reservation, unless the Indian citizens of the reservation vote to accept jurisdiction." *Id.*, at 512. The court also rejected petitioner's federal and state constitutional challenges, relying in part on the argument that the discrimination against Indian litigants em-

bodied in Chapter 27–19 was authorized by Pub. L. 280 and was therefore insulated, under *Washington* v. *Yakima Indian Nation*, 439 U. S. 463 (1979), from heightened scrutiny. See 321 N. W. 2d, at 512–513.

This Court granted certiorari. 461 U. S. 904 (1983). We held that federal law did not preclude the state court from asserting jurisdiction over petitioner's claim. In particular, we ruled that Pub. L. 280 neither required nor authorized North Dakota to disclaim the jurisdiction it had lawfully exercised over the claims of Indian plaintiffs against non-Indian defendants prior to the enactment of Pub. L. 280. See *Three Tribes I*, 467 U. S., at 150. Because the North Dakota Supreme Court's interpretation of Chapter 27–19 and its accompanying constitutional analysis appeared to rest on a possible misunderstanding of Pub. L. 280, this Court vacated the judgment and remanded the case to allow the North Dakota court to reconsider the jurisdictional questions in light of the proper interpretation of the governing federal statute. *Id.*, at 141.

On remand, the North Dakota Supreme Court held that Chapter 27–19 terminated any residuary jurisdiction that may have existed over claims arising in Indian country brought by tribal Indians against non-Indians in state court. 364 N. W. 2d, at 104. It further held that state law barred petitioner from maintaining its suit in state court absent its waiver of its sovereign immunity in accordance with the statutory procedures. *Id.*, at 103–104. Finally, the court rejected petitioner's due process and equal protection challenges. It stated that petitioner had not been denied a due process right to access to the courts by action of the state, reasoning that it was the Indian people who had deprived themselves of access to state jurisdiction in declining to avail themselves of the State's jurisdictional offer by waiving their sovereign immunity. See *id.*, at 106. The North Dakota court then ruled that the jurisdictional disclaimer did not violate the Equal Protection Clause because, by virtue of the

consent provision, "[t]he statute does not treat [the Tribe] less than equal, it treats them more than equal." *Id.*, at 107.

We granted certiorari to examine petitioner's claims that Chapter 27–19 violates the Federal Constitution and is pre-empted by federal Indian law. Although respondent at no time objected to our consideration of the federal pre-emption issue, and in fact briefed it on the merits, our review of the proceedings below indicates that this question was not explicitly raised before, and was not decided by the North Dakota Supreme Court. We have recognized that in such circumstances that there is "weighty presumption against review." *Heath* v. *Alabama*, 474 U. S. —— (1985). See also *Illinois* v. *Gates*, 462 U. S. 213, 218–222 (1983). We believe, however, that this presumption has been overcome in this instance by a combination of circumstances.

First, respondent's failure to raise any challenge to our consideration of the pre-emption issue, cf. *Oklahoma City* v. *Tuttle*, 471 U. S. ——, —— (1985), and its apparent willingness to have the question decided, argues for review. Second, this case has already been sent back to the North Dakota Supreme Court once, and we are reluctant to further burden that court by resolving less than all the federal questions addressed by the parties. Since we have twice had the benefit of the Supreme Court of North Dakota's reasoning on closely aligned issues, we do not believe that our consideration of the federal pre-emption issue is a disservice to that court or to the litigants, or impairs our informed decision of the issue.

Because we believe that the North Dakota law is pre-empted insofar as it is applied to disclaim pre-existing jurisdiction over suits by tribal plaintiffs against non-Indians for which there is no other forum, absent the Tribe's waiver of its sovereign immunity and consent to the application of state civil law in all cases to which it is a party, we reverse.

II

Our cases reveal a "'trend . . . away from the idea of inherent Indian sovereignty as a[n independent] bar to state jurisdiction and toward reliance on federal pre-emption.'" *Rice* v. *Rehner*, 463 U. S. 713, 718 (1983) (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 172 (1973) (footnote omitted)). Yet considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy, if not of themselves sufficient to "pre-empt" state regulation, nevertheless form an important backdrop against which the applicable treaties and federal statutes must be read. See, *e. g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 334 (1983); *Rice* v. *Rehner*, *supra*, at 718–719. Accordingly, we have formulated a comprehensive pre-emption inquiry in the Indian law context which examines not only the congressional plan, but also "the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 145 (1980). In the instant case, this pre-emption inquiry yields the conclusion that the legislative plan embodied in Pub. L. 280 forecloses North Dakota from disclaiming jurisdiction over petitioner's suit, and further, that the state interest advanced by the North Dakota jurisdictional scheme in this context is overshadowed by long-standing federal and tribal interests.

A

Pub. L. 280 represents the primary expression of federal policy governing the assumption by States of civil and criminal jurisdiction over the Indian Nations. The Act was the result of "comprehensive and detailed congressional scrutiny," *Kennerly* v. *District Court of Montana*, 400 U. S. 423, 424, n. 1, 427 (1971), and was intended to replace the ad hoc regulation of state jurisdiction over Indian country with general legislation, providing "for all affected States to come

within its terms." S. Rep. No. 699, 83d Cong., 1st Sess., 5 (1953). See also Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 540–544 (1975). In examining the effect of comprehensive legislation governing Indian matters such as this, "our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. They have also rejected the proposition that pre-emption requires 'an express congressional statement to that effect.'" *New Mexico* v. *Mescalero Apache Tribe*, *supra*, at 334 (quoting *White Mountain Apache Tribe* v. *Bracker*, *supra*, at 144) (footnote omitted). See also *Rice* v. *Rehner*, *supra*, at 719. Rather, we have found that where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled pre-empted by federal law. See, *e. g.*, *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965).

Given the comprehensiveness of the federal regulation in this area of Indian law, our conclusion in *Three Tribes I* that Congress generally intended to authorize the assumption, not the disclaimer, of state jurisdiction over Indian country is persuasive evidence that the instant disclaimer conflicts with the federal scheme. See 467 U. S., at 150. But we need not rest upon this conclusion alone, for Congress' specific treatment of the retrocession of previously assumed jurisdiction permits no doubt that North Dakota's disclaimer is inconsistent with the requirements of Pub. L. 280.

As originally enacted, Pub. L. 280 plainly contemplated that, if States chose to extend state court jurisdiction over causes of action arising in Indian country, they would be required to honor that commitment, for the Act made no provision for States to return any jurisdiction to the United States. See F. Cohen, Handbook of Federal Indian Law 370 (1982) (hereinafter Cohen). Congress' failure to provide for the retrocession of jurisdiction assumed by the States is fully

consistent with the purposes underlying Pub. L. 280: promoting the gradual assimilation of Indians into the dominant American culture and easing the fiscal and administrative burden borne by the Federal Government by virtue of its control over Indian affairs. See Goldberg, *supra*, at 542–544. See also H. R. Rep. No. 848, 83d Cong., 1st Sess., 3, 6 (1953). Were States permitted to, at their option and at any time, retrocede all or part of the jurisdiction they had assumed and to leave Indians with no recourse for civil wrongs, the congressional plan of gradual but steady assimilation could be disrupted and the divestment of federal dominance nullified.

When Congress subsequently revisited the question of retrocession in the 1968 Amendments, it provided that "[t]he United States is authorized to accept a retrocession by any State," 25 U. S. C. §1323(a), but it specifically limited this authorization to the retrocession of jurisdiction assumed under Pub. L. 280 pursuant to the original 1953 version of the statute. See *ibid.* (permitting retrocession of jurisdiction "acquired by [the] State pursuant to the provisions of section 1162 of title 18, of the United States Code, section 1360 of title 28, of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section"). See also Exec. Order No. 11435, 3 CFR 754 (1966–1970 Comp.) (giving Secretary of the Interior discretionary authority to accept retrocession of jurisdiction by a State); Goldberg, *supra*, at 558–559. This retrocession provision apparently was added in response to Indian dissatisfaction with Pub. L. 280. See Cohen 370. In light of this congressional purpose, the fact that Congress did not provide for retrocession of jurisdiction lawfully assumed prior to the enactment of Pub. L. 280 or of jurisdiction assumed after 1968 cannot be attributed to mere oversight or inadvertence. Since Congress was motivated by a desire to shield the Indians from unwanted extensions of jurisdiction over them, there was no need to provide for

retrocession in those circumstances because the previously assumed jurisdiction over Indian country was only lawful to the extent that it was consistent with Indian tribal sovereignty and self-government, see, *e. g.*, *Williams* v. *Lee*, 358 U. S. 217 (1959), and the jurisdiction assumed after 1968 could be secured only upon the receipt of tribal consent. See 25 U. S. C. § 1321.

North Dakota may not, and indeed has not attempted to, rely on § 1323(a) as authority for its disclaimer of jurisdiction over claims such as petitioner's because it did not assume such jurisdiction under any of the provisions specified in § 1323(a), nor has the United States accepted the retrocession. We have previously enforced the procedural requirements and the jurisdictional provisions of Pub. L. 280 quite stringently, consistent with our understanding that the jurisdictional scheme embodied in that Act was the product of a wide-ranging and detailed congressional study. See, *e. g.*, *Kennerly* v. *District Court of Montana*, *supra*, at 427. See also *Washington* v. *Yakima Indian Nation*, 439 U. S., at 484 ("the procedural requirements of Pub. L. 280 must be strictly followed"); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S., at 180. Accordingly, we conclude that since North Dakota's disclaimer is not authorized by § 1323(a), it is barred by that section.

In sum, because Pub. L. 280 was designed to extend the jurisdiction of the States over Indian country and to encourage state assumption of such jurisdiction, and because Congress specifically considered the issue of retrocession but did not provide for disclaimers of jurisdiction lawfully acquired other than under Pub. L. 280 prior to 1968, we must conclude that such disclaimers cannot be reconciled with the congressional plan embodied in Pub. L. 280 and thus are pre-empted by it.

B

Our consideration of the State's interest in disclaiming the pre-existing, unconditional jurisdiction extended to tribal

Indians suing non-Indian defendants, and in replacing it with an extension of jurisdiction conditioned on the Tribe's waiver of its sovereign immunity and its agreement to the application of state law in all suits to which it is a party, reinforces our conclusion that Chapter 27–19 is inconsistent with federal law. Simply put, the state interest, as presently implemented, is unduly burdensome on the federal and tribal interests.

As the North Dakota Supreme Court explained, Chapter 27–19 was originally designed as a unilateral assumption of jurisdiction over Indian country, which was intended to provide a means of enforcing contracts between Indians and non-Indians and a tribunal for trying tort actions, family law matters, and "many [other] types of actions too numerous to mention." 364 N. W. 2d, at 102, and n. 5. The North Dakota legislature added the consent provision to Chapter 27–19 as a compromise to "accomodate the will of the Indian people." *Id.*, at 103. Those Indians who opposed the assertion of state jurisdiction against them would not be subjected to it absent consent, but neither would they be permitted to enjoy state jurisdiction as plaintiffs absent consent to suit as defendants. See *id.*, at 107. Certainly, the State's interest in requiring that all its citizens bear equally the burdens and the benefits of access to the courts is readily understandable. But here, federal interests exist which override this state interest.

The federal interest in ensuring that all citizens have access to the courts is obviously a weighty one. See, *e. g.*, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510, 513–514 (1972); *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 741, 742–744 (1983). This Court and many state courts have long recognized that Indians share this interest in access to the courts, and that tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country. See,

e. g., *Three Tribes I*, 467 U. S., at 148, and n. 7 (citing authority). North Dakota conditions the Tribe's access to the courts on its waiver of its tribal sovereign immunity and agreement to the application of state civil law in all state court civil actions to which it is or may be a party. These conditions apply regardless of whether, as here, the Tribe has no other effective means of securing relief for civil wrongs. As the State concedes, even if the Tribe were to have access to tribal court to resolve civil controversies with non-Indians, it would be unable to enforce those judgments in state court; thus, the Tribe cannot be said to have a meaningful alternative to state adjudication by way of access to other tribunals in such cases. See Tr. of Oral Arg. 26, 27. Cf. *Lohnes* v. *Cloud*, 254 N. W. 2d 430 (ND 1977). Respondent argues that the Tribe is not truly deprived of access to the courts by the North Dakota jurisdictional scheme because the Tribe could have unrestricted access to the State's courts by "merely" consenting to the statutory conditions. We conclude, however, that those statutory conditions may be met only at an unacceptably high price to tribal sovereignty and thus operate to effectively bar the Tribe from the courts.

The North Dakota jurisdictional scheme requires the Tribe to accept a potentially severe intrusion on the Indians' ability to govern themselves according to their own laws in order to regain their access to the state courts. The statute provides that "[t]he civil jurisdiction herein accepted and assumed [upon Indian consent] shall include but shall not be limited to the determination of parentage of children, termination of parental rights, commitments by county courts, guardianship, marriage contracts, and obligations for the support of spouse, children, or other dependents." N. D. Cent. Code § 27–19–08 (Supp. 1985). Although these subjects clearly encompass areas of traditional tribal control, see *Fisher* v. *District Court*, 424 U. S., at 388–389; *United States* v. *Quiver*, 241 U. S. 602 (1916), the North Dakota statute contemplates that state civil law will control in these areas. See

§27–19–01. Respondent argues that Chapter 27–19 safeguards tribal self-government by also providing that any tribal ordinance or custom "shall, if not inconsistent with the applicable civil law of this state, be given full force and effect in the determination of civil claims for relief pursuant to this section." §27–19–09. This provision plainly provides that state law will generally control, however, and will merely be supplemented by nonconflicting Indian ordinances or customs, even in cases that arise on the reservation, that involve only Indians, and that concern subjects which are within the jurisdiction of the tribal court.

This result simply cannot be reconciled with Congress' jealous regard for Indian self-governance. See, *e. g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S., at 334–335, and n. 17 ("both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes"). See also *Fisher* v. *District Court*, *supra*, at 388–389. "A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.'" *New Mexico* v. *Mescalero Apache Tribe*, *supra*, at 332 (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S., at 171–172).

Chapter 27–19's requirement that the Tribe consent to suit in *all* civil causes of action before it may again gain access to state court as a plaintiff also serves to defeat the Tribe's federally conferred immunity from suit. The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. See, *e. g.*, *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49 (1978). Of course, because of the peculiar "quasi-sovereign" status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy. *United States* v. *United States Fidelity & Guaranty Co.*, 309

U. S. 506, 513 (1940). Cf. also *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 173. And this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition. See *Santa Clara Pueblo* v. *Martinez*, *supra*, at 58. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

To be sure, not all conditions imposed on access to state courts which potentially affect tribal immunity, and thus tribal self-government, are objectionable. For instance, even petitioner concedes that its tribal immunity does not extend to protection from the normal processes of the state court in which it has filed suit. See Tr. of Oral Arg. 7, 10–11 ("The Three Affiliated Tribes believe it would be proper in the interest of justice that they would be subject to discovery proceedings and to proceedings that would insure a fair trial to the non-Indian defendants"). Petitioner also concedes that a non-Indian defendant may assert a counterclaim arising out of the same transaction or occurrence that is the subject of the principal suit as a setoff or recoupment. See *Id.*, at 6–7, 9. It is clear, however, that the extent of the waiver presently required by Chapter 27–19 is unduly intrusive on the Indian's common law sovereign immunity, and thus on its ability to govern itself according to its own laws. By requiring that the Tribe open itself up to the coercive jurisdiction of state courts for *all* matters occurring on the reservation, the statute invites a potentially severe impairment of the authority of the tribal government, its courts, and its laws. See, *e. g.*, *Fisher* v. *District Court*, *supra*, at 387–388.*

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*The extent to which respondent's counterclaim may be used not only to defeat or reduce petitioner's recovery, but also to fix the Tribe's affirmative liability has been the subject of some discussion in this case. See, *e. g.*, Tr. of Oral Arg. 6–11. We have no occasion to resolve this issue because the case comes to us before trial and we do not know the extent of the counter-claim asserted by respondent.

Pub. L. 280 certainly does not constitute a "governing Act of Congress" which validates this type of interference with tribal immunity and self-government. We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance. As we explained in *Bryan* v. *Itasca County*, 426 U. S. 373, 387–388 (1976):

> "Today's congressional policy toward reservation Indians may less clearly than in 1953 favor their assimilation, but Pub. L. 280 was plainly not meant to effect total assimilation . . . . [N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations,' *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975) . . . . The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4(c), 28 U. S. C. § 1360(c), providing for the 'full force and effect' of any tribal ordinances or customs 'heretofore or hereafter adopted by an Indian tribe . . . if not inconsistent with any applicable civil law of the State,' contemplates the continuing vitality of tribal government." (Footnote omitted).

Certainly, the 1968 Amendments to Pub. L. 280 pointedly illustrate the continuing congressional concern over tribal sovereignty. The impetus for the addition of a consent requirement in the 1968 Amendments was congressional dissatisfaction with the involuntary extension of state jurisdiction over Indians who did not feel they were ready to accept such jurisdiction, or who felt threatened by it. See, *e. g.*, S. Rep. No. 721, 90th Cong., 1st Sess., 32 (1967) (views of Sen. Ervin) ("Tribes have been critical of Public Law 280 because it authorizes the unilateral application of State law to

all tribes without their consent and regardless of their needs or special circumstances. Moreover, it appears that tribal laws were unnecessarily preempted . . ."); Rights of Members of Indian Tribes: Hearing on H. R. 15419 and Related Bills before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess., 25 (1968) (referring to tribal consent requirement as a way to ensure that Indians are not "subjected" to state courts' jurisdiction before they are ready).

In sum, the State's interest is overly broad and overly intrusive when examined against the backdrop of the federal and tribal interests implicated in this case. See *Rice* v. *Rehner*, 463 U. S., at 719. The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted. Our examination of the state, tribal, and federal interests implicated in this case, then, reinforces our conclusion that North Dakota's disclaimer of jurisdiction over suits such as this cannot be reconciled with the congressional plan embodied in Pub. L. 280.

The judgment of the North Dakota Supreme Court is reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 84–1973

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, PETITIONER *v.* WOLD ENGINEERING ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

[June 16, 1986]

JUSTICE REHNQUIST, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

North Dakota law provides that in order for an Indian tribe such as petitioner to avail itself of the jurisdiction of North Dakota courts as a plaintiff, it must also accept the jurisdiction of those courts when it is properly named as a defendant in them. This Court holds that such a rule—which would commend itself to most people as eminently fair—is pre-empted by federal law. To support this conclusion the Court advances two arguments: first, pre-emption by Pub. L. 280, and, second, the "overshadowing" of the state interest by "long-standing federal and tribal interest." *Ante*, at 7. Neither by themselves nor in the rather awkward juxtaposition in which the Court places them are these arguments persuasive.

The Court's argument based on Pub. L. 280 consists of two assertions: (1) Pub. L. 280 pre-empts Chapter 27–19's disclaimer of preexisting jurisdiction because the federal statute establishes a "comprehensive" legislative plan to govern Indian matters, and Chapter 27–19's disclaimer is incompatible with the plan's general purpose to authorize the assumption of state jurisdiction over Indian country, *ante*, at 7–8; and (2) the initial failure of Pub. L. 280 to authorize a disclaimer of jurisdiction, combined with the subsequent authorization of

such disclaimer in the 1968 amendments with respect to jurisdiction assumed pursuant to Pub. L. 280, evidence a congressional intent to forbid the disclaimer of jurisdiction assumed prior to the passage of Pub. L. 280. *Ante*, at 8–10.

The Court provides no support for its assertion that Pub. L. 280 establishes a "comprehensive" federal scheme that pre-empts any state law that may inhibit the accomplishment of its general purpose. The Court's citation to *Kennerly* v. *District Court of Montana*, 400 U. S. 423, 427 (1971) *(per curiam)*, is unhelpful; the Court there was describing the "comprehensive and detailed" scrutiny that Congress appeared to give in deciding whether or not to eliminate federal barriers to state jurisdiction over Indian matters, and not the nature of Pub. L. 280. In addition, the brevity of Pub. L. 280, its 1968 amendments, and the relevant legislative history belie the Court's assertion that these statutes establish a "comprehensive" plan like statutes that occupy a given field of regulation. Cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 248 (1984). Pub. L. 280 does little more than make a general pronouncement that certain federal barriers to state jurisdiction have been eliminated. See Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 589. Nor does the legislative history, the 1968 amendments, or their legislative history provide any additions that transform the general pronouncement into a "comprehensive" plan. See S. Rep. No. 699, 83d Cong., 1st Sess. (1953); Pub. L. 90–284, Title IV, §§ 402, 403, 82 Stat. 79; S. Rep. No. 721, 90th Cong., 2d Sess. (1968).

There is also nothing inconsistent between the state's disclaimer of pre-existing jurisdiction and the purpose of Pub. L. 280. Congress stated that Pub. L. 280 was designed to accomplish two general purposes:

> "First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such." S. Rep. No. 699, *supra*.

The statute's elimination of certain federal barriers to the assertion of state jurisdiction over Indian country was an important means of furthering these goals. But the statute's complete silence on the disclaimer of state jurisdiction cannot reasonably be taken to imply an intent to forbid such disclaimer. This is especially true with respect to jurisdiction lawfully assumed before the passage of Pub. L. 280, since disclaimer of such jurisdiction would certainly have been entirely proper before passage of the act.

Nor can any congressional intent to forbid the disclaimer of jurisdiction asserted prior to the passage of Pub. L. 280 be reasonably inferred from the subsequent authorization of such disclaimer with respect to jurisdiction asserted pursuant to the Pub. L. 280. This Court has long recognized that federal law has a "generally interstitial character," *Richards* v. *United States*, 369 U. S. 1, 7 (1962), in the sense that Congress generally enacts legislation against the background of existing state law. See, *e. g.*, *Burks* v. *Lasker*, 441 U. S. 471, 478 (1979), citing P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 470–471 (1973). An appreciation for this traditional understanding of the nature of state power does not render superfluous the congressional authorization of disclaimer in the 1968 amendments to Pub. L. 280. See Pub. L. 90–284, Title IV, §§ 402, 403, 82 Stat. 79. Since the 1968 amendments were generally designed to impose a limitation on the ability of state legislatures to assert jurisdiction over Indian country, Congress could reasonably have intended the provision authorizing the disclaimer of previously asserted jurisdiction to encourage such disclaimer with a concomitant retention of a more limited form of jurisdiction. That the disclaimer provision referred only to jurisdiction asserted pursuant to Pub. L. 280 says nothing about congressional intent as to jurisdiction lawfully asserted in some other way. Given the traditional powers of state government, it is unreasonable to interpret such silence as evidence of an intent to

forbid the States from disclaiming jurisdiction asserted in another way. I find the Court's pre-emption analysis to be quite unconvincing.

I think the Court's reasoning supporting its conclusion that federal and tribal interests "overshadow" the State's interest in fair play for litigants fares no better that its reasoning about Pub. L. 280. The requirement that a tribe consent to the general civil jurisdiction of state courts as a *quid pro quo* for access to those courts as a plaintiff seems entirely fair and evenhanded to me. Nothing in Pub. L. 280 or any other federal statute requires a state to accept jurisdiction over Indian country in the first place. Nor has such an obligation been created as a matter of federal case law dealing with the Indians. To the contrary, all the cases and statutes with which I am familiar speak only to the limitations on the *assertion* of jurisdiction over these matters. Thus, because Congress and this Court have left the states free to bar access entirely by simply not asserting jurisdiction over Indian country at all, I do not see how any "federal interest" precludes them from establishing conditions on the assertion of jurisdiction, and thereby on access to state courts, as North Dakota has done here: the employment of the North Dakota courts in matters in which the tribe has an interest shall not be solely at the option of the tribe.

I think there is nothing in Pub. L. 280 nor in federal Indian policy that prohibits North Dakota from applying its statute in the manner in which it did in this case, and I therefore dissent from the Court's contrary conclusion.

986/84-1974

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ROSE, WARDEN *v.* CLARK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84–1974. Argued March 24, 1986—Decided July 2, 1986

Respondent was charged with the murder of two persons arising from the same incident. At his trial in a Tennessee state court he defended on the ground, *inter alia*, that he was either insane or incapable of forming the requisite intent to kill the victims. The court instructed the jury on both first-degree murder, which requires proof of premeditation and deliberation under Tennessee law, and second-degree murder, which requires proof of malice but not of planning and premeditation. The court then instructed the jury that "[a]ll homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption" and that "if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously." The jury found respondent guilty of first-degree murder of one victim and of second-degree murder of the other. The Tennessee Court of Appeals affirmed, rejecting respondent's argument that the malice instruction impermissibly shifted the burden of proof as to malice. Respondent then sought habeas corpus relief in Federal District Court, which held that the malice instruction was unconstitutional under *Sandstrom* v. *Montana*, 442 U. S. 510, wherein it was held that a jury instruction creating a presumption of malice that has the effect of either eliminating intent as an issue, or of shifting the burden of proof as to intent to the defendant, violates due process. The District Court then went on to find that the error could not be deemed harmless because respondent had "relied upon a *mens rea* defense." The United States Court of Appeals affirmed.

Held:

1. The harmless-error standard of *Chapman* v. *California*, 386 U. S. 18, under which a reviewing court should not set aside an otherwise valid conviction if the court may confidently say, on the whole record, that the

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Syllabus

constitutional error in question was harmless beyond a reasonable doubt, applies to the erroneous malice instruction in this case. Respondent had an opportunity to present evidence and argue in support of his innocence, he was tried by an impartial jury, supervised by an impartial judge, and, aside from the malice instruction, the jury was clearly instructed that it had to find respondent guilty beyond a reasonable doubt as to every element of both first- and second-degree murder. In this context, the erroneous malice instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction. The error in the instruction of impermissibly shifting the burden of proof on malice was not "so basic to a fair trial" that it could never be harmless. The purpose behind the *Sandstrom* rule of ensuring that only the guilty are punished supports this conclusion. Nor is a *Sandstrom* error equivalent to a directed verdict for the State, since when a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. Pp. 5–11.

2. Although this Court has authority to decide whether, on the facts of a particular case, a constitutional error was harmless under the *Chapman* standard, it does so sparingly. Accordingly, since the United States Court of Appeals has not yet applied *Chapman* to the facts of this case, the case is remanded to that court to determine whether the error in question was harmless beyond a reasonable doubt. Pp. 12–13.

762 F. 2d 1006, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion. STEVENS, J., filed an opinion concurring in the judgment. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84–1974

JIMMY C. ROSE, WARDEN, PETITIONER *v.* STANLEY BARHAM CLARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[July 2, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the harmless error standard of *Chapman* v. *California*, 386 U. S. 18 (1967), applies to jury instructions that violate the principles of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), and *Francis* v. *Franklin*, 471 U. S. —— (1985).[1]

I

On December 30, 1978, Charles Browning and Joy Faulk were shot to death while they sat in Browning's pickup truck

[1] In *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), the Court was equally divided on the question whether ordinary harmless-error analysis was appropriate in cases of *Sandstrom* error. Compare *id.*, at 84–87 (plurality opinion) (such error "is the functional equivalent of a directed verdict" on intent, and is therefore harmless only when the defendant concedes intent), with *id.*, at 95–99 (POWELL, J., dissenting) (*Chapman* standard applies to *Sandstrom* error). Cf. *id.*, at 88 (STEVENS, J., concurring in judgment) (joining affirmance of state court decision that *Sandstrom* error could not be harmless, but on the ground that the decision was actually one of state law). The *Johnson* plurality noted that state and federal courts were in conflict on this issue. *Id.*, at 75, n. 1 (collecting cases). Due in part to the divided views in *Johnson*, that conflict has persisted. Compare, *e. g.*, *Tucker* v. *Kemp*, 762 F. 2d 1496, 1501–1503 (CA11 1985) (en banc) (applying *Chapman* harmless-error analysis), cert. pending, No. 85–6447, with *In re Hamilton*, 721 F. 2d 1189, 1190–1191 (CA9 1983) (holding that *Sandstrom* error would be harmless only if intent was not contested at trial).

in a remote area of Rutherford County, Tennessee. Respondent Stanley Clark, Faulk's former boyfriend, was charged with the murders.

The evidence introduced at trial showed that Browning, Faulk, and Faulk's two young children (ages 6 and 3) had been driving in Rutherford County on the night of the murders. According to the older child, another vehicle followed Browning's truck for about an hour. Browning pulled his truck into a private driveway, apparently to let the other vehicle pass. The driver of the second vehicle then pulled in behind Browning, thereby blocking any exit. The driver left his vehicle, walked up to the cab of Browning's truck, and fired four shots at point-blank range. One shot struck Browning in the head, two others struck Faulk in the head, and the fourth struck Faulk in the left shoulder. The killer left the scene in his vehicle. Both Browning and Faulk died.

Faulk's children, who had not been shot, went for help, telling a local resident that "Clicker" (the nickname by which the children knew respondent) had shot Browning and their mother. Earlier that night, police had seen respondent following Browning's truck. Police soon located respondent, but apprehended him only after a high-speed chase. Police found the murder weapon, a .25-caliber pistol that respondent had borrowed from a friend, near respondent's home. At trial, the State relied on the foregoing evidence, and on evidence showing that respondent and Joy Faulk had a stormy love affair that Faulk ended in the fall of 1978. Several times after their break-up, respondent threatened to kill Faulk if he ever found her with another man.

Respondent offered two lines of defense. First, he contended that Sam Faulk, Joy's ex-husband, killed the victims because of a dispute concerning custody of the two Faulk children. The State rebutted this contention by introducing evidence that no such dispute existed, and that Sam Faulk was elsewhere when the murders were committed. Second, re-

spondent argued that he was either insane or incapable of forming the requisite criminal intent. To support this argument, respondent introduced evidence that he was suffering from amnesia and could not remember the events of the night of the murders. In addition, some testimony suggested that respondent had been drinking heavily the entire day before the murders. Finally, two defense psychiatrists testified that respondent was legally insane at the time the murders were committed because his depression concerning his recent break-up with Joy Faulk made it impossible for him to conform his conduct to the law.

At the close of trial, the court instructed the jury on the elements of both first- and second-degree murder. Under Tennessee law, first-degree murder requires proof of premeditation and deliberation, while second-degree murder requires proof of malice. The court's instructions defined malice as "an intent to do any injury to another, a design formed in the mind of doing mischief to another." App. 186. Malice did not require proof of planning or premeditation; a killing "upon a sudden impulse of passion" sufficed if committed with intent to harm another. *Id.*, at 187. The court then charged the jury:

> "All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable . . . doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State." *Ibid.*

The jury found respondent guilty of first-degree murder for killing Faulk and of second-degree murder for killing Browning.

The Tennessee Court of Criminal Appeals affirmed the convictions, rejecting respondent's argument that the jury instructions had impermissibly shifted the burden of proof as to malice.[2] Respondent then sought habeas corpus relief in the Middle District of Tennessee. The District Court held that the malice instruction had violated respondent's right to have his guilt proved beyond a reasonable doubt, as that right was defined in *Sandstrom* v. *Montana*.[3] The court went on to find that the error could not be deemed harmless because respondent had "relied upon a *mens rea* defense" in contesting his guilt. 611 F. Supp. 294, 302 (1983).

The Court of Appeals for the Sixth Circuit affirmed.[4] The court agreed that the malice instruction was unconstitutional under *Sandstrom*. Turning to the question whether the error was harmless, the court reasoned that because respondent contested malice at his trial, an erroneous burden-shifting instruction could not be harmless under governing precedent. App. to Pet. for Cert. A–5 (citing *Engle* v.

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[2] The Court of Criminal Appeals noted that, almost immediately following the "presumption" instruction, the judge charged:

"The question of whether the alleged killing was done with malice is for you to determine from the entire case, and you should look to all of the facts and circumstances developed by the evidence to determine whether the State has . . . proven beyond a reasonable doubt the existence of malice. If you have a reasonable doubt as to whether the alleged killing was done with malice, then the Defendant cannot be guilty of murder in the second degree and you must acquit him of that offense." App. 188.

The Court of Criminal Appeals reasoned that this instruction adequately informed the jurors that the burden of proof on malice remained on the State at all times. App. to Pet. for Cert. A–37 to A–39.

[3] In *Sandstrom* we held that an instruction creating a presumption of malice that has the effect of shifting the burden of proof on intent to the defendant violates due process under the rule of *In re Winship*, 397 U. S. 358 (1970). *Sandstrom* v. *Montana*, 442 U. S. 510, 523–524 (1979). *Sandstrom* was decided shortly before respondent's trial commenced. 611 F. Supp. 294, 296, n. 3 (1983).

[4] The Court of Appeals' judgment is reported at 762 F. 2d 1006 (1985). The court's opinion is unpublished.

Koehler, 707 F. 2d 241, 246 (CA6 1983), aff'd by an equally divided Court, 466 U. S. 1 (1984)). The court reached this conclusion "despite the substantial evidence of petitioner's guilt," and added:

> "Were we writing on a clean slate, we would direct our inquiry to that suggested by Justice Powell (dissenting) in *Connecticut* v. *Johnson*, 460 U. S. at 97 n. 5:
>
> > the inquiry is whether the evidence is so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.
>
> If that were the question in this case . . . we might be able to respond in the affirmative." App. to Pet. for Cert. A–6.

The court nevertheless affirmed the order granting habeas corpus relief. We granted certiorari limited to the question whether the Court of Appeals' harmless-error analysis was correct.[5] 474 U. S. —— (1985).

II

A

In *Chapman* v. *California*, 386 U. S. 18 (1967), this Court rejected the argument that errors of constitutional dimension necessarily require reversal of criminal convictions. And since *Chapman*, "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware* v. *Van Arsdall*, 475 U. S. ——, —— (1986). That principle has been applied to a wide

[5] We thus do not consider whether, taken in context, the instructions were permissible under our decisions in *Sandstrom* and in *Francis* v. *Franklin*, 471 U. S. —— (1985). For purposes of our harmless-error analysis, we assume that the Court of Appeals properly held that the instructions were unconstitutional.

variety of constitutional errors. *E. g., id.*, at —— (failure to permit cross-examination concerning witness bias); *Rushen* v. *Spain*, 464 U. S. 114, 118 (1983) *(per curiam)* (denial of right to be present at trial); *United States* v. *Hasting*, 461 U. S. 499, 508–509 (1983) (improper comment on defendant's failure to testify); *Moore* v. *Illinois*, 434 U. S. 220, 232 (1977) (admission of witness identification obtained in violation of right to counsel); *Milton* v. *Wainwright*, 407 U. S. 371 (1972) (admission of confession obtained in violation of right to counsel); *Chambers* v. *Maroney*, 399 U. S. 42, 52–53 (1970) (admission of evidence obtained in violation of the Fourth Amendment). See also *Hopper* v. *Evans*, 456 U. S. 605, 613–614 (1982) (citing *Chapman*, and finding no prejudice from trial court's failure to give lesser-included offense instruction). Our application of harmless-error analysis in these cases has not reflected a denigration of the constitutional rights involved. Instead, as we emphasized earlier this Term:

> "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *United States* v. *Nobles*, 422 U. S. 225, 230 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) ('Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.')." *Delaware* v. *Van Arsdall*, *supra*, at ——.

Despite the strong interests that support the harmless-error doctrine, the Court in *Chapman* recognized that some constitutional errors require reversal without regard to the evidence in the particular case. 386 U. S., at 23, n. 8, citing *Payne* v. *Arkansas*, 356 U. S. 560 (1958) (introduction of coerced confession); *Gideon* v. *Wainwright*, 372 U. S. 335

(1963) (complete denial of right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (adjudication by biased judge). This limitation recognizes that some errors necessarily render a trial fundamentally unfair. The State of course must provide a trial before an impartial judge, *Tumey* v. *Ohio*, *supra*, with counsel to help the accused defend against the State's charge, *Gideon* v. *Wainwright*, *supra*. Compare *Holloway* v. *Arkansas*, 435 U. S. 475, 488–490 (1978) with *Cuyler* v. *Sullivan*, 446 U. S. 335, 348–350 (1980). Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, see *Powell* v. *Alabama*, 287 U. S. 45 (1932), and no criminal punishment may be regarded as fundamentally fair. Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury.[6] See *Delaware* v. *Van Arsdall*, *supra*, at —— (constitutional errors may be harmless "in terms of their effect on *the factfinding process at trial*") (emphasis added); *Chapman*, *supra*, at 24 (error is harmless if, beyond a reasonable doubt, it "did not *contribute to the verdict* obtained") (emphasis added).

Similarly, harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572–573 (1977) (citations omitted). Accord, *Carpenters* v. *United States*, 330 U. S. 395, 408 (1947). This rule stems from the Sixth Amendment's clear command to af-

[6] Each of the examples *Chapman* cited of errors that could never be harmless either aborted the basic trial process, *Payne* v. *Arkansas*, 356 U. S. 560 (1958) (use of coerced confession), or denied it altogether, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (denial of counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (biased adjudicator).

ford jury trials in serious criminal cases. See *Duncan* v. *Louisiana*, 391 U. S. 145 (1968). Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

We have emphasized, however, that while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. *United States* v. *Hasting*, 461 U. S., at 509. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware* v. *Van Arsdall*, 475 U. S., at ——; *United States* v. *Hasting*, *supra*, at 508–509.

B

Applying these principles to this case is not difficult. Respondent received a full opportunity to put on evidence and make argument to support his claim of innocence. He was tried by a fairly selected, impartial jury, supervised by an impartial judge. Apart from the challenged malice instruction, the jury in this case was clearly instructed that it had to find respondent guilty beyond a reasonable doubt as to every element of both first- and second-degree murder. See also n. 2, *supra*. Placed in context, the erroneous malice instruction does not compare with the kinds of errors that automatically

require reversal of an otherwise valid conviction.[7] We therefore find that the error at issue here—an instruction that impermissibly shifted the burden of proof on malice—is not "so basic to a fair trial" that it can never be harmless. Cf. *Chapman*, 386 U. S., at 23.

The purpose behind the rule of *Sandstrom* v. *Montana* supports this conclusion. *Sandstrom* was a logical extension of the Court's holding in *In re Winship*, 397 U. S. 358 (1970), that the prosecution must prove "every fact necessary to constitute the crime with which [the defendant] is charged" beyond a reasonable doubt. *Id.*, at 364; see *Sandstrom*, 442 U. S., at 520, 523; *Francis* v. *Franklin*, 471 U. S., at ——. The purpose of that rule is to ensure that only the guilty are criminally punished. As the Court stated last term in *Francis* v. *Franklin*, the rule "protects the 'fundamental value determination of our society,' given voice in Justice Harlan's concurrence in *Winship*, that 'it is far worse to convict an innocent man than to let a guilty man go free.'" *Ibid.*, quoting *Winship*, *supra*, at 372 (Harlan, J., concurring). When the verdict of guilty reached in a case in which *Sandstrom* error was committed is correct beyond a reasonable doubt, reversal of the conviction does nothing to promote the interest that the rule serves.

Nor is *Sandstrom* error equivalent to a directed verdict for the State.[8] When a jury is instructed to presume malice

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[7] Unlike errors such as judicial bias or denial of counsel, the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced respondent thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. Cf. *Holloway* v. *Arkansas*, 435 U. S. 475, 490–491 (1978). Consequently, there is no inherent difficulty in evaluating whether the error prejudiced respondent in this case. See *United States* v. *Frady*, 456 U. S. 152, 171–174 (1982) (evaluating *Sandstrom* error for prejudice under the "cause and actual prejudice" standard of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977)).

[8] "Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors

from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. *Connecticut* v. *Johnson*, 460 U. S. 73, 96–97 (1983) (POWELL, J., dissenting). In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury. See, *e. g.*, *Lamb* v. *Jernigan*, 683 F. 2d 1332, 1342–1343 (CA11 1982), cert. denied, 460 U. S. 1024 (1983). In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*'s words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt. See *Connecticut* v. *Johnson*, *supra*, at 97 (POWELL, J., dissenting); Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1388, n. 192 (1979).

No one doubts that the trial court properly could have instructed the jury that it could *infer* malice from respondent's conduct. See *Francis* v. *Franklin*, 471 U. S., at ——; *Ulster County Court* v. *Allen*, 442 U. S. 140, 157–163 (1979). Indeed, in the many cases where there is no direct evidence of intent, that is exactly how intent is established.[9] For purposes of deciding this case, it is enough to recognize that in some cases that inference is overpowering. See *Hopper* v. *Evans*, 456 U. S., at 613.[10] It would further neither justice

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that prevent a jury from considering an issue." *Connecticut* v. *Johnson*, 460 U. S., at 95, n. 3 (POWELL, J., dissenting). Cf. *Jackson* v. *Virginia*, 443 U. S. 307, 320, n. 14 (1979) (suggesting that failure to instruct a jury as to the reasonable-doubt standard cannot be harmless).

[9] See *Brooks* v. *Kemp*, 762 F. 2d 1383, 1423 (CA11 1985) (Kravitch, J., concurring and dissenting) (emphasizing that juries are free to infer intent from conduct).

[10] In *Hopper* v. *Evans*, we held that States are not constitutionally required to instruct juries about lesser included offenses where such instructions are not warranted by the evidence. The defendant in that case claimed that the trial court should have instructed the jury as to unintentional homicide during the commission of a robbery. We concluded:

nor the purposes of the *Sandstrom* rule to reverse a conviction in such a case.[11] We accordingly hold that *Chapman*'s harmless-error standard applies in cases such as this one.[12]

"It would be an extraordinary perversion of the law to say that intent to kill is not established when a felon, engaged in an armed robbery, admits to shooting his victim in the back . . . . The evidence not only supported the claim that respondent intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim. An instruction on the offense of unintentional killing during this robbery was therefore not warranted." 456 U. S. 605, 613 (1982) (citation omitted).

As *Hopper* suggests, it would defy common sense to conclude that an execution-style killing or a violent torture-murder was committed unintentionally. See *Connecticut* v. *Johnson*, 460 U. S., at 99, n. 7 (POWELL, J., dissenting). It follows that no rational jury would need to rely on an erroneous presumption instruction to find malice in such cases. *Id.*, at 97, and n. 5.

[11] We think the dissent, and not the Court, "asks and answers the wrong question" in this case. *Post*, at 7 (BLACKMUN, J., dissenting). We agree that the determination of guilt or innocence, according to the standard of proof required by *Winship* and its progeny, is for the jury rather than the court. See *id.*, at 4. Harmless-error analysis addresses a different question: what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome? This question applies not merely to *Sandstrom* violations, but to other errors that may have affected either the instructions the jury heard or the record it considered—including errors such as mistaken admission of evidence, or unconstitutional comment on a defendant's silence, or erroneous limitation of a defendant's cross-examination of a prosecution witness. All of these errors alter the terms under which the jury considered the defendant's guilt or innocence, and therefore all theoretically impair the defendant's interest in having a jury decide his case. The dissent's argument—that the Sixth Amendment forbids a reviewing court to decide the impact of a trial error on the outcome, *post*, at 4—logically implies that all such errors are immune from harmless-error analysis. Yet this Court repeatedly has held to the contrary. *E. g.*, *Delaware* v. *Van Arsdall*, 475 U. S. —— (1986) (limitation on defendant's cross-examination); *United States* v. *Hasting*, 461 U. S. 499 (1983) (improper comment on defendant's failure to testify); *Moore* v. *Illinois*, 434 U. S. 220 (1977) (admission of improperly obtained witness identification). Indeed, *Chapman* v. *California*, 386 U. S. 18 (1967), the beginning of this line of cases, applied harmless-error analysis to an error that placed an

III

Although the Court of Appeals acknowledged that *Sandstrom* error might in some cases be harmless, its analysis of the issue cannot square with *Chapman*. The court concluded that a *Sandstrom* error could never be harmless where a defendant contests intent. App. to Pet. for Cert. A–5. But our harmless error cases do not turn on whether the defendant conceded the factual issue on which the error bore. Rather, we have held that "*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." *United States* v. *Hasting*, 461 U. S., at 509, n. 7. The question is whether, "on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt." *Id.*, at 510. See also *Chapman*, 386 U. S., at 24 ("before a federal constitutional

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improper argument before the jury. *Id.*, at 24–25 (finding comment on defendant's silence harmful). See also *Hopper* v. *Evans*, 456 U. S., at 613–614 (citing *Chapman*, and finding error in jury instructions harmless). These decisions, ignored by the dissent, strongly support application of harmless-error analysis in the context of *Sandstrom* error.

[12] The dissent contends that the jury's decision to convict respondent of only one count of premeditated murder "aptly illustrate[s] why harmless-error analysis is inappropriate" in cases where intent is at issue. *Post*, at 5 (BLACKMUN, J., dissenting). This argument is without merit. The jury determined that respondent was guilty beyond a reasonable doubt of "intend[ing] to take the life" of Joy Faulk "with cool purpose." App. 185 (trial court's charge defining premeditation). The jury then determined that respondent was guilty of the malicious, but not premeditated, murder of Charles Browning. The only alleged error in these instructions was the trial court's instruction that the jury could presume *malice* from a killing. Respondent's (and the dissent's) theory is that a proper instruction on the burden of proof on malice might have led the jury to find *neither* malice *nor* premeditation as to Faulk's killing. This argument is implausible on its face.

We leave the question whether the error in this case was harmless beyond a reasonable doubt to the Court of Appeals on remand. We do suggest that the different verdicts for the two killings in no way support respondent's contention that the *Sandstrom* error in this case was prejudicial.

error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"); *Connecticut* v. *Johnson*, 460 U. S., at 97, n. 5 (POWELL, J., dissenting) (in cases of *Sandstrom* error, "the inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption"). Thus, the fact that respondent denied that he had "an intent to do any injury to another," App. 186, does not dispose of the harmless-error question.

Although we "plainly have the authority" to decide whether, on the facts of a particular case, a constitutional error was harmless under the *Chapman* standard, we "do so sparingly." *United States* v. *Hasting*, *supra*, at 510. The Court of Appeals has not yet applied *Chapman* to the facts of this case. We therefore remand to that court for determination of whether the error committed in this case was harmless beyond a reasonable doubt.[13]

IV

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[13] The parties disagree as to the scope of the relevant evidence that must be assessed under *Chapman*. In particular, petitioner argues that evidence of amnesia, of respondent's drunkenness on the day of the murders, and of insanity is irrelevant to malice. Respondent disagrees. These are, of course, issues of Tennessee law in the first instance, and we need not resolve them here. Nor do we express any view as to whether, assuming all the evidence in question is relevant to malice, the error in this case was nevertheless harmless beyond a reasonable doubt.

SUPREME COURT OF THE UNITED STATES

No. 84-1974

JIMMY C. ROSE, WARDEN, PETITIONER *v.*
STANLEY BARHAM CLARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[July 2, 1986]

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, although I see no need for remanding for application of harmless error analysis.

The evidence in this case showed that respondent stalked the victims by car for about an hour. After trapping the victims' truck in a private driveway, respondent fired four shots at point blank range killing both victims. Two young girls, ages 3 and 6, were in the truck and witnessed the slaying. Their mother was one of the victims. After the murder, respondent left the scene but was apprehended by the police after a high-speed chase. In my view, such evidence overwhelmingly demonstrates that respondent acted with malice.

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[July 2, 1986]

JUSTICE STEVENS, concurring in the judgment.

The Court correctly concludes that the harmless error standard of *Chapman* v. *California*, 386 U. S. 18 (1967) applies to the erroneous jury instructions in this case. I do not agree, however, with the Court's dictum regarding the nature of harmless error analysis.

I

According to the Court, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." *Ante*, at 8. This statement stands in sharp contrast with the Court's analysis in *Chapman* itself.

The principal question presented in *Chapman* was "whether there can ever be harmless constitutional error," 386 U. S., at 20. Without questioning the view that constitutional error is always sufficiently serious to create a presumption in favor of reversal, the Court refused "to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." *Id.*, at 21. Far from announcing any general principle that harmless error analysis is the rule rather than the exception, the Court stated its holding in this language: "We conclude that there may be some constitutional errors which in the setting of a

particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.*, at 22.

Thereafter, in its opinion the Court emphasized that the burden of showing that constitutional error is harmless is heavier than the burden of showing that ordinary trial error is harmless. The Court noted that "the original common-law harmless error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Id.*, at 24. It then fashioned its constitutional rule by reference to its earlier decision in *Fahy* v. *Connecticut*, 375 U. S. 85 (1963), stating:

> "There is little, if any, difference between our statement in *Fahy* v. *Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case." 386 U. S., at 24.

Rather than creating a broad, new presumption in favor of harmless error analysis, then, *Chapman* merely rejected the notion that such analysis was always impermissible and articulated a rigorous standard for determining whether a pre-

sumptively prejudicial error could, in fact, be deemed harmless.

II

The Court's statement about the "rule" of harmless error review, and the reasons for it, is neither an adequate explanation of our current case law nor a sound judgment about what harmless error jurisprudence should be.

As the Court recognizes, harmless error inquiry remains inappropriate for certain constitutional violations no matter how strong the evidence of guilt may be. *Ante*, at 6–7. See also *Chapman*, 386 U. S., at 23, n. 8. The Court suggests that the inapplicability of harmless error to these violations rests on concerns about reliability and accuracy, and that such concerns are the only relevant consideration in determining the applicability of harmless error. *Ante*, at 8. In fact, however, violations of certain constitutional rights are not, and should not be, subject to harmless error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial. Thus, racial discrimination in the selection of grand juries is intolerable even if the defendant's guilt is subsequently established in a fair trial.[1] Racial discrimination in the selection of a petit jury may require a new trial without any inquiry into the ac-

[1] See *Vasquez* v. *Hillery*, —— U. S. ——, —— (1986) (slip op. 8) ("[I]ntentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent. Thus, the remedy we have embraced for over a century—the only effective remedy for this violation—is not disproportionate to the evil that it seeks to deter"). In *Vasquez*, the Court explicitly rejected the dissent's suggestion that grand jury discrimination should be subject to harmless error analysis because of a general principle that "a conviction should not be reversed for constitutional error where the error did not affect the outcome of the prosecution." *Id.*, at 3 (POWELL, J., dissenting). See also *Rose* v. *Mitchell*, 443 U. S. 545 (1979).

tual impact of the forbidden practice.[2] The admission of a coerced confession can never be harmless even though the basic trial process was otherwise completely fair and the evidence of guilt overwhelming.[3] In short, as the Court has recently emphasized, our Constitution, and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination.[4] A coherent harmless error jurisprudence should similarly respect those values.

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[2] See *Batson* v. *Kentucky*, —— U. S. ——, —— (1986) (slip op. 19–20) ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed"). See also *Turner* v. *Murray*, —— U. S. ——, —— (1986) (plurality opinion) ("The inadequacy of *voir dire* [about the possibility of racial prejudice] in this case requires that petitioner's death sentence be vacated. . . . Our judgment in this case is that there was an unacceptable risk of racial prejudice infecting the *capital sentencing proceeding*"). In *Turner*, the Court explicitly rejected the dissent's suggestion that the death sentence should stand because no actual jury prejudice was evident from the record. See *id.*, at 3 (POWELL, J., dissenting) ("Nothing in this record suggests that racial bias played any role in the jurors' deliberations").

[3] See *Payne* v. *Arkansas*, 356 U. S. 560, 568 (1958) ("[T]his Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, supporting a judgment of conviction, the admission of evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment"); *Chapman*, 386 U. S., at 23, n. 8 (citing *Payne* as "coerced confession" case and example of constitutional error that may not be deemed harmless). See also *Miller* v. *Fenton*, —— U. S. ——, —— (1985) (slip op. 5) ("This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particulart suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment").

[4] See *Allen* v. *Hardy*, —— U. S. ——, —— (1986) (slip op. 4) ("By serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding fuction of a criminal trial. But the decision serves other values as well. Our holding ensures that States do not discriminate against citizens who are summoned to

In addition to giving inadequate respect to constitutional values besides reliability, adopting a broad presumption in favor of harmless error also has a corrosive impact on the administration of criminal justice. An automatic application of harmless error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever present and always powerful interest in obtaining a conviction in a particular case.[5] It is particularly striking to compare the Court's apparent willingness to forgive constitutional errors that redound to the prosecutor's benefit with the Court's determination to give conclusive effect to trivial errors that obstruct a defendant's ability to raise meritorious constitutional arguments.[6]

Both a proper respect for a range of constitutional values and the interest in an even-handed approach to the administration of justice convince me that the Court's dictum about a sweeping presumption in favor of harmless error review is not only unnecessary, but also unsound.

III

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sit in judgment against a member of their own race and strengthens public confidence in the administration of justice. The rule in *Batson*, therefore, was designed to 'serve multiple ends,' only the first of which may have some impact on truthfinding"); *Allen* v. *Illinois*, —— U. S. ——, —— (1986) (slip op. 10) ("The privilege against self-incrimination enjoined by the Fifth Amendment is not designed to enhance the reliability of the fact-finding determination; it stands in the Constitution for entirely independent reasons").

[5] Cf. *United States* v. *Jackson*, 429 F. 2d 1368, 1373 (CA7 1970) (Clark, J., sitting by designation) ("'Harmless error' is swarming around the 7th Circuit like bees. Before someone is stung, it is suggested that the prosecutors enforce *Miranda* to the letter and the police obey it with like diligence; otherwise the courts may have to act to correct a presently alarming situation"). See also *United States* v. *Lane*, —— U. S. ——, ——, nn. 13 and 14 (1986) (STEVENS, J., dissenting) (collecting authorities criticizing the impact of the Court's recent expansive harmless error jurisprudence).

[6] See, *e. g.*, *Smith* v. *Murray*, —— U. S. —— (1986).

In this particular case, however, the primary constitutional value protected by our holdings in *Sandstom* v. *Montana*, 442 U. S. 510 (1979) and *Francis* v. *Franklin*, 471 U. S. —— (1985) is an accurate determination of the defendant's guilt or innocence. In my opinion, this is also not the kind of error with such an inherently imprecise effect that harmless error inquiry is ill-advised.[7] It follows that the Federal Constitution does not command a rule of automatic reversal, and that the Court of Appeals should review the entire record to determine whether it is able to declare a belief that the constitutional error was harmless beyond a reasonable doubt.[8]

Accordingly, I concur in the judgment.

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[7] Cf. *Holloway* v. *Arkansas*, 435 U. S. 475, 491 (1978) (harmless error analysis inappropriate in assessing the constitutional error of joint representation in part because such an inquiry requires "unguided speculation"); *United States* v. *Lane*, —— U. S. ——, —— (1986) (STEVENS, J., dissenting) (slip op. 10 and n. 4).

[8] A State, of course, remains free not to apply harmless error review as a matter of State constitutional protections. See *Delaware* v. *Van Arsdall*, —— U. S. ——, —— (1986) (STEVENS, J., dissenting); *Connecticut* v. *Johnson*, 460 U. S. 73, 88 (1983) (STEVENS, J., concurring in judgment). Because the Court of Appeals for the Sixth Circuit is more familiar with Tennessee law than we are, it is appropriate for that court to conisder the state of Tennessee law on this subject.

SUPREME COURT OF THE UNITED STATES

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STANLEY BARHAM CLARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[July 2, 1986]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Stanley Clark was deprived of two rights: the right guaranteed by the Due Process Clause of the Fourteenth Amendment to compel the State of Tennessee to prove beyond a reasonable doubt every element of the crimes with which he was charged, and the right guaranteed by the Sixth Amendment to have a jury of his peers determine whether the State had met that burden. Today, the Court focuses entirely on the former right and disregards totally the latter. A reviewing court's conclusion that the record would support a conviction by a properly instructed jury has no bearing on the question whether a defendant was denied the right to have the jury that actually tried him make that determination. "To conform to due process of law, [defendants are] entitled to have the validity of their convictions appraised on consideration of the case . . . as the issues were determined in the trial court." *Cole* v. *Arkansas*, 333 U. S. 196, 202 (1948). A trial that was fundamentally unfair at the time it took place, because the jury was not compelled to perform its constitutionally required role, cannot be rendered fundamentally fair in retrospect by what amounts to nothing more than an appellate review of the sufficiency of the evidence. I therefore dissent from the Court's holding that harmless-error analysis should be applied.

I

Stanley Clark was indicted on charges of the first-degree murder of Joy Faulk and Charles Browning. He pleaded not guilty to both charges. At trial, Clark contested every element of the crime. He argued that he had not committed the killings, that he could not recall, due to amnesia, any event connected with the killings, and, alternatively, that he was incapable of forming any culpable intent due to mental illness and intoxication. Defense counsel's opening statement and the testimony of psychiatric experts and persons close to Clark put the question whether Clark possessed the requisite mental state directly before the jury.

At the close of trial, the court instructed the jury that malice, "an intent to do any injury to another," was a necessary element of first- as well as second-degree murder. App. 186. The trial court then instructed the jury, which for three days had heard testimony raising doubts about Clark's capacity to form the requisite intent, that "if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted . . . ." *Id.*, at 187.[1] The trial court went on to instruct the jury that voluntary manslaughter is a killing without malice. *Id.*, at 188.

The District Court found, and the Court of Appeals for the Sixth Circuit agreed, that the jury instructions were constitutionally infirm under *Sandstrom* v. *Montana*, 442 U. S. 510 (1979).[2] App. to Pet. for Cert. A–1, A–7. The sole

[1] The trial court's wording of the definition of malice and of the presumption of malice for first-degree murder differed slightly from that it gave for second-degree murder, presented in the text. Because these differences are immaterial, the courts below treated the instructions as if they were identical, see App. to Pet. For Cert. A–10, A–12, as does the majority.

[2] Under *Sandstrom*, both mandatory conclusive presumptions, which remove the presumed element from the case once the State has proved the predicate fact, and mandatory rebuttable presumptions, which require the jury to find the presumed element unless the defendant rebuts the pre-

question before the Court is whether such error can ever be harmless. See *ante*, at 5. In *Sandstrom*, the Court held that burden-shifting jury instructions on the question of intent, like the instructions here, violate the Due Process requirement recognized in *In Re Winship*, 397 U. S. 358 (1970), that a conviction is valid only if the State has proved beyond a reasonable doubt every element of the crime. 442 U. S., at 521. Thus, as the majority assumes, there was clear constitutional error in Clark's trial, see *ante*, at 5 and n. 4, and the question before the Court is only whether that error was harmless.

II

The harmless-error rule stems from this Court's recognition that some trial errors are sufficiently tangential to the trial process that they fairly may be overlooked. *Chapman* v. *California*, 386 U. S. 18, 22 (1967). But the Court also has recognized the existence of a class of constitutional errors that "necessarily render a trial fundamentally unfair," *ante*, at 7, and thus are not amenable to harmless-error analysis. "Harmless error analysis," according to the majority, "presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Ibid.* Thus, errors that deny a defendant "the basic trial process" can "never be harmless." *Ante*, at 7, n. 5. The archetypal examples of such acts are denial of the right to counsel and trial before a biased judge. See *ante*, at 6–7; *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Tumey* v. *Ohio*, 273 U. S. 510 (1927). The salient feature these examples share is that effective defense counsel and an impartial judge play central roles in the basic trial process. The Sixth and Fourteenth Amendments clearly establish the jury as an equally central entity. Cf. *ante*, at 7–8. What the Court's opinion today fails to comprehend is that the

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sumption, are unconstitutional. See *Sandstrom* v. *Montana*, 442 U. S. 510, 517–518 (1979); *Francis* v. *Franklin*, —— U. S. ——, ——, n. 2 (1985) (slip op. 6, n. 2). This case involves the latter type.

instruction in this case interfered so fundamentally with the jury's performance of its constitutionally mandated role that the error involved is analytically indistinguishable from those errors the Court finds inappropriate for harmless-error analysis.

The Framers chose to protect defendants, not primarily by regulating the substance of the criminal law, but by establishing certain trial procedures to be followed in a criminal case. See Underwood, The Thumb on the Scale of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L. J. 1299, 1317–1318 (1977). The jury's central obligation under the Due Process Clause is to determine whether the State has proved each element of the offense charged beyond a reasonable doubt. See *Sandstrom* v. *Montana*, *supra*; *In re Winship*, *supra*. The Constitution assigns this function "solely to the jury." *Sandstrom*, 442 U. S., at 523. This duty cannot be interfered with, see *County Court of Ulster County* v. *Allen*, 442 U. S. 140, 169 (1979) (POWELL, J., dissenting), nor delegated to another entity. "Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See *Connecticut* v. *Johnson*, 460 U. S. 73, 95, and n. 3 (1983) (POWELL, J., dissenting)." *Cabana* v. *Bullock*, —— U. S. ——, —— (1986) (slip op. 7); see also *Cole* v. *Arkansas*, 333 U. S., at 202. The Constitution does not allow an appellate court to arrogate to itself a function that the defendant, under the Sixth Amendment, can demand be performed by a jury.

A jury that receives a constitutionally flawed, burden-shifting instruction on intent is, in effect, directed to return a verdict against the defendant. *Connecticut* v. *Johnson*, 460 U. S. 73, 84 (1983) (plurality opinion). Because a jury is the primary finder of fact, "'a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction.'"

Ibid., quoting *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572–573 (1977). The erroneous instruction invites the jury to abdicate its constitutional responsibility to decide for itself whether the State has proved every element of the offense beyond a reasonable doubt. It is likely that the jury will accept this invitation because "there is no reason to believe the jury would have deliberately undertaken the more difficult task" of evaluating the evidence of intent, when offered the opportunity simply to rely on a presumption, *Sandstrom*, 442 U. S., at 526, n. 13; *Connecticut* v. *Johnson*, 460 U. S., at 85 (plurality opinion). When a defendant contests the issue of intent, a reviewing court will rarely be capable of deciding whether the error contributed to the verdict: it will have no way of knowing how the jury treated the question of intent. See *Sandstrom*, 442 U. S., at 526; *County Court of Ulster County* v. *Allen*, 442 U. S., at 175–176 (POWELL, J., dissenting).[5]

The verdicts reached in this case aptly illustrate why harmless-error analysis is inappropriate in cases where a defendant contests the element of *mens rea*. Clark was charged with the first-degree murders of two people, who were together in a truck when they were killed. The State used the same evidence to prove that Clark killed Faulk as to prove that he killed Browning. Yet the jury found Clark guilty of the first-degree murder of Faulk and the second-degree murder of Browning. That the jury reached distinct verdicts shows that it focused closely on the question of Clark's mental culpability, the precise issue on which the court gave the constitutionally defective charge. A reviewing court simply cannot determine whether this jury in fact relied on the flawed instruction. It certainly is possible that it did: perhaps the jury did not find sufficient intent to convict

[5] Where, of course, a defendant has conceded intent, the use of an erroneous presumption as to intent may be superfluous, and a "reviewing court can be confident that a *Sandstrom* error did not play any role in the jury's verdict." See *Connecticut* v. *Johnson*, 460 U. S., at 87 (plurality opinion).

Clark of second-degree murder, and but for the presumption of malice would have convicted him of voluntary manslaughter, for which malice was not required. It is of no value to point to any evidence presented at trial of Clark's intent; "[a]n erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence." *Connecticut* v. *Johnson*, 460 U. S., at 85 (plurality opinion). The ordinary view is that a jury adheres to the instructions, *Parker* v. *Randolph*, 442 U. S. 62, 73 (1979) (plurality opinion), and there is no reason to believe that the "lay jury will know enough to disregard the judge's bad law if in fact he misguides them." *Bollenbach* v. *United States*, 326 U. S. 607, 613–614 (1946).

It is true that "[w]hen a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt." *Ante*, at 9–10. But that truism is beside the point here, where the only fact that the jury was required to find in order to trigger the presumption was that "a killing has occurred." App. 187. The jury was instructed to presume criminal intent, the *sine qua non* of criminal responsibility, from the fact of a dead body. The jury may have found the fact that there was a body, but this jury has not met *In re Winship*'s requirement of finding, beyond a reasonable doubt, "every fact necessary to constitute the crime," 397 U. S., at 364: this jury may never have found that Clark acted with malice, an essential element of the crimes of which he was convicted.

III

The Court recognized 40 years ago that the question a reviewing court must ask "is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards" required by the Constitution. *Bollenbach* v. *United States*, 326 U. S., at 614. When a jury has not been properly instructed concern-

ing an essential element of the offense that has been charged, the danger exists that the defendant has been deprived of his Sixth and Fourteenth Amendment right to have the jury determine whether the State has proved each element of the offense beyond a reasonable doubt. Faced with an incorrect instruction and a general verdict of guilty, a reviewing court simply lacks any adequate basis for deciding whether the jury has performed its constitutionally required function. Because I believe the Court today asks and answers the wrong question, I dissent.